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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983, MDL 565

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED FOR REVIEW

In actions governed by the Warsaw Convention Treaty and Montreal Agreement, may the airline assert the $75,000 damage limitation where it failed to give the required warning of that limitation to its passengers?[1]

LIST OF PARTIES TO THE PROCEEDING[2]

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1 If certiorari is granted, the Court may wish to address an additional question to guide lower courts in the future: following a transfer for pretrial proceedings only under 28 U.S.C. § 1407, is the transferee court required to apply the substantive federal law existing in the transferor court?

2 The following plaintiffs are parties to this proceeding: Elisa Chan, Roberta Cruz, Hans Ephraimson-Abt, Willie James, Dorothy Jones, Michael D. Jones, Betty B. S. Lim, In Jig Lin, Marsha Maikovich, Louella Nassief, Kyung Hwa Park, Barbara Swift, Christina Ting, David WuDunn, Sung Wha Yoo and Marjorie Zicherman. After the motion below was filed, additional actions were commenced, are not formally included in this appeal, but involve the same issue. The plaintiffs in those actions are: Robert Boyar, Evelyn Chauncey, William Cunningham, Lenore Lebow, Katherine McDonald, William Stevens and Terry Weng. The defendant is Korean Air Lines, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (App. A, *infra*, pp. A-1 to A-66) is reported at 829 F.2d 1171 (D.C. Cir. 1987). It adopted the first district court opinion (App. A, *infra*, pp. A-12 to A-44) reported at 664 F. Supp. 1463 (D.D.C. 1985). The second district court opinion (App. A, *infra*, pp. A-67 to A-70) is reported at 664 F. Supp. 1488 (D.D.C. 1987).

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, A-71) was entered on September 25, 1987. By order dated November 16, 1987 (App. A, *infra*, p. A-73), the Court of Appeals denied a petition for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

This case involves the Warsaw Convention Treaty,[3] the Montreal Agreement[4] and two Federal Aviation Regulations.[5] Their pertinent provisions are set forth in App. B, *infra*.

STATEMENT OF THE CASE

Petitioners are the surviving family members and estate representatives of eighteen passengers killed in the Korean Air Lines (KAL) catastrophe of September 1, 1983. KAL flight 7 departed from Kennedy Airport, New York bound for Seoul, Korea. Instead of following its prescribed and safe routing over international waters, the pilots flew the plane more than three hundred miles off course into the airspace of the Soviet Union. The KAL plane was fired upon by a Soviet military fighter aircraft and crashed, killing all 269 aboard.[6]

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3 A Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note.

4 Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), *reprinted in* Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-16 (1974).

5 14 C.F.R. § 221.175(a); 14 C.F.R. § 213.7.

6 Five years earlier, another KAL passenger jet entered Soviet airspace on a flight from Paris to Seoul, was fired upon and crash landed in Siberia.

The damage limitation warning. Each of the cases are governed by the Warsaw Convention and the Montreal Agreement, which KAL signed in 1969. Pursuant to 14 C.F.R. § 213.7, foreign airlines must sign the Agreement as a condition of their permit to operate in the United States. While Article 22 of the Warsaw Convention imposed a damage limitation of 125,000 gold francs (approximately $8,300)[7], the Montreal Agreement raised the limitation to $75,000. Article 3 of the Convention required that the airline deliver a ticket to the passenger containing a statement giving notice of the limitation. The Montreal Agreement and Federal Aviation Regulation 14 C.F.R. § 221.175(a) specify that the Article 3 notice be printed in at least 10 point type.

KAL admitted that it breached its Agreement and violated the regulation by delivering warnings to the petitioners' passengers in smaller 8 point type.

Prior proceedings. Wrongful death actions were commenced against Korean Air Lines in various federal district courts.[8] Federal court jurisdiction in the actions was based on 28 U.S.C. § 1331, by virtue of the Warsaw Convention Treaty[9], and 28 U.S.C. § 1332.

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7 This Court has previously upheld the Civil Aeronautics Board regulation which converted the Convention's damage limitation into dollars by using the last official price of gold. *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984).

8 Of the seventeen actions for the deaths of eighteen passengers involved in this petition, eleven were filed in the Southern and Eastern Districts of New York, three in the Eastern District of Michigan, two in the District for the District of Columbia and one in the District of Massachusetts.

9 In *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), the Second

Despite the opposition of those plaintiffs who commenced suits in New York, the Judicial Panel on Multidistrict Litigation granted KAL's 28 U.S.C. § 1407 motion to transfer all cases arising out of the disaster to the District of Columbia for pretrial discovery proceedings. *In re Korean Air Lines Disaster*, 575 F. Supp. 342 (J.P.M.L. 1983).

On February 15, 1984, plaintiffs moved for partial summary judgment declaring that KAL was liable for actual damages, having forfeited the $75,000 damage limitation of Warsaw/Montreal by delivering tickets with small print warnings less than the required minimum.

On July 25, 1985, the district court rendered its memorandum and order denying plaintiffs' motion (App. A, *infra*, A-12 to A-44). The issue was certified for appeal and leave to appeal was granted pursuant to 28 U.S.C. § 1292(b).

Following oral argument, the Court of Appeals remanded the appeal for further findings on the issue of whether the district court was bound to apply the decisions of the Court of Appeals for the Second Circuit in those actions originally filed in New York and transferred to the District of Columbia for pretrial proceedings. On May 7, 1987, the district court ruled that it was not bound by Second Circuit precedent in those cases (App. A, *infra*, pp. A-67 to A-70).

On September 25, 1987, the District of Columbia Circuit rendered its opinion (App. A, *infra*, pp. A-1 to A-66) and judgment (App. A, *infra*, p. A-71) affirming the district court. Plaintiffs petition this Court for a writ of certiorari.

Circuit held that the Warsaw Convention created federal question jurisdiction.

ARGUMENT

Certiorari should be granted to resolve a conflict among the federal appellate courts in the interpretation of the Warsaw Convention Treaty and Montreal Agreement created by *Korean Air Lines Disaster*.

The Circuit Court below expressly acknowledged the need for Supreme Court review herein, stating that this is an appeal "meriting attention from Higher Authority", and "that the proper interpretation of the Convention and Agreement, as well as the scope of the transferee court's interpretive authority in a case such as this one, are matters in need of definitive resolution for our national court system". App. A, *infra*, pp. A-6, A-11; 829 F.2d at 1174, 1176.

This Court has previously granted certiorari on the same Warsaw notice issue but its determination did not create binding precedent. By an equally divided panel, this Court affirmed the Second Circuit's holding that an airline lost the limitation by giving a notice in inadequate small print. *Lisi v. Alitalia*, 390 U.S. 455 (1968), *aff'g by an equally divided Court*, 370 F.2d 508 (2d Cir. 1966).

Korean Air Lines Disaster departed from a previously unbroken line of eight appellate decisions during the past two decades which held that the Convention requires delivery of an adequate warning to a passenger before the airline may benefit from Warsaw's limitation. And *Korean Air Lines Disaster* upset the minimum 10 point type print standard for the Warsaw notice established by the Executive Branch through regulation and the Montreal Agreement.

The Second Circuit and recently the Fifth Circuit issued decisions squarely in point contrary to *Korean Air Lines Disaster. In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) (hereinafter *Polish Airlines*); *In re Air Crash Disaster Near New Orleans, Louisiana*, 789 F.2d 1092, 1102 (5th Cir.), *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *reinstated*, 821 F.2d 1147, 1171 (5th Cir. 1987) (*en banc*) (hereinafter *New Orleans Disaster*). *Polish Airlines* and *New Orleans Disaster* held that airlines forfeited the limitation where they delivered ticket warnings printed in smaller than the minimum permissible size.

The issue raised is an important one which governs the transportation of thousands of international passengers each day. The need for this Court to address this conflict is particularly compelling because eleven of the seventeen cases should be returned to New York district courts at the conclusion of pretrial proceedings. If this Court does not decide the issue, the New York federal courts would be faced with the Second Circuit precedent in *Polish Airlines* and *Lisi v. Alitalia* and the contrary ruling of the District of Columbia Circuit.

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE PROPER INTERPRETATION OF THE WARSAW CONVENTION AND MONTREAL AGREEMENT

A. The need for certiorari is substantial and was urged by both courts below

While this Court's affirmance of *Lisi v. Alitalia*, 390 U.S. 455 (1968), *aff'g by an equally divided Court*, 370 F.2d 508 (2d Cir. 1966), was by an equally divided panel and did not create a binding precedent, *Lisi* has been uniformly followed with one exception: the decision below. *Korean Air Lines Disaster* is the only dissent to a long settled area of law.

Both the court of appeals and the district court below expressed the need for Supreme Court review of the Warsaw/Montreal issue. App. A, *infra*, p. A-11; 829 F.2d at 1176; App. A, *infra*, p. A-70; 664 F. Supp. at 1490 ("[T]he Supreme Court is available to finally decide the question after an application for certiorari. This should be the course of the present litigation.").

B. *Korean Air Lines Disaster* is contrary to the Warsaw Convention and eight appellate decisions which hold that adequate warning to the passenger is required as a *quid pro quo* of the damage limitation

Article 3 of the Warsaw Convention provides that "the carrier must deliver a passenger ticket which shall contain

. . . [a] statement that the transportation is subject to the rules relating to liability established by this convention." The Convention's central liability rule is the damage limitation of Article 22, which provides that "the liability of the carrier is limited to the sum of 125,000 francs." Failure to deliver the Warsaw ticket results in the forfeiture of the limitation under Article 3: "if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

Except for *Korean Air Lines Disaster*, there is complete unanimity among all United States courts that Article 3 of the Warsaw Convention requires delivery of a ticket with adequate warning of the damage limitation as a condition for the airline to obtain the limitation. *Lisi v. Alitalia*, 390 U.S. 455 (1968), *aff'g mem. by an equally divided Court*, 370 F.2d 508 (2d Cir. 1966); *In re Air Crash Disaster Near New Orleans, Louisiana*, 789 F.2d 1092 (5th Cir. 1986), *aff'd in relevant part*, 821 F.2d 1147 (1987) (*en banc*); *In re Air Crash Disaster at Warsaw Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983); *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973); *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965); *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

The clear intent of the drafters of Article 3 was to make passengers aware of the limitation so that they could take self-protective measures, such as purchasing insurance,

prior to boarding a flight. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 917 (D.C. Cir. 1973) ("[T]he passenger is to receive full and effective notice of any limitations of liability so that alternative protection may be obtained."); *Block v. Compagnie National Air France*, 386 F.2d 323, 333-34 (1967).

Adequate size of the damage limitation is a key to Article 3. *Lisi v. Alitalia*, 390 U.S. 455 (1968), *aff'g mem. by an equally divided Court*, 370 F.2d 508 (2d Cir. 1966), held that delivery of a small print notice was the equivalent of no notice at all. The Second Circuit found that a carrier's 4-point type notice was "camouflaged in Lilliputian print", being "virtually invisible" and "diminutively sized." 370 F.2d at 514. Thus, the airline was barred from asserting the limitation:

> The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to make, the amount of the recovery to him or his family in the event of a crash, is limited very substantially.

Id. at 512-13.[10]

Soon after *Lisi*, a unanimous panel of the New York State Court of Appeals held that a similar small print

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10 The United States government opposed the grant of certiorari in *Lisi* and agreed with the Second Circuit "that a ticket purporting to warn of limited liability under the Warsaw Convention does not of itself comply with Article 3 of the Convention if printed in type too small to attract reasonable notice." Brief for *Amicus* C.A.B. at 1n, *Lisi v. Alitalia*, 390 U.S. 455 (1968).

warning (in 4.5 point type) violated Article 3 of the Convention as a matter of law and voided the limitation. *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).[11]

Likewise, the Ninth Circuit, Second Circuit and the New York State Court of Appeals have held that the Article 3 notice must be delivered sufficiently in advance of a flight to allow a passenger to take self protective measures. *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965) (limitation forfeited since ticket warning was not delivered until passenger was on the ramp leading into the aircraft); *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965) (airline denied limitation where passenger received ticket notice after boarding); *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982) (limitation denied since airline failed to deliver ticket until after passenger had completed first leg of her trip).

Korean Air Lines Disaster is contrary to all other United States cases in holding that adequate notice is not a *quid pro quo* of the damage limitation. App. A, *infra*, pp. A-30 to A-39; 664 F. Supp. at 1473-76.

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11 *Lisi v. Alitalia* and *Egan v. Kollsman Instrument Corp.* involved air crashes which occurred several years before the Montreal Agreement and Federal Aviation Regulation § 221.175(a) were enacted. Both courts noted, however, the then recent adoption of the 10 point minimum standard. *Lisi v. Alitalia*, 370 F.2d at 514 n. 10; *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d at 171, 234 N.E.2d at 204, 287 N.Y.S.2d at 21.

C. The *Polish Airlines* decision of the Second Circuit and the *New Orleans Disaster* decision of the Fifth Circuit are squarely in point and oppose *Korean Air Lines Disaster*

A clear standard for the minimum size of the Article 3 warning—10 point type—was set when the Executive Branch promulgated 14 C.F.R. § 221.175(a) and then required international airlines to enter the "special contract" known as the Montreal Agreement. Korean Air Lines signed the agreement in 1969. Both the regulation and Agreement prescribe that the Warsaw notice be printed "in type at least as large as 10 point modern type".

In *Polish Airlines*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983), the airline delivered an Article 3 warning in small 8.5 point type, violating the Agreement and Regulation. Based on an exhaustive review of the history of the Convention and its notice provisions, the Second Circuit held that the carrier had forfeited the limitation. *Id.* at 91. The Fifth Circuit recently reached the same result where the airline delivered a 9 point warning. *New Orleans Disaster*, 789 F.2d 1092, 1102 (5th Cir.), *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *reinstated*, 821 F.2d 1147, 1171 (5th Cir. 1987) (*en banc*).

In the case at bar, KAL printed its Article 3 notice in 8 point type print, smaller than the notices issued in *Polish Airlines* and *New Orleans Disaster*. Yet *Korean Air Lines Disaster* holds that KAL may benefit from the damage limitation despite its failure to provide the specified warning. This result contravenes the history, purpose and language of the Warsaw/Montreal system.

1. *Korean Air Lines Disaster* upsets the uniform 10 point minimum standard for the Article 3 warning demanded by the United States as a condition for withdrawing its denunciation of the Convention

The 10 point type standard was imposed because of the concern of the United States government that international airlines were avoiding their Warsaw obligation to give passengers a proper notice of the unusual limited liability system. Article 3 of the Convention did not specify the size of the warning required to benefit from the limitation and many airlines printed "notices" in unreadable small type. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 512-14 (1967) ("Even if the passenger could read the ticket, he would hunt in vain for warning of the liability limit."). If the unorthodox damage limitation was to continue, at least the passenger should receive a proper Article 3 notice. *Ibid.*

In 1955, American negotiators at the Hague Convention unsuccessfully argued for an Article 3 warning measuring one half centimeter high—larger than 10 point type. *Id.* at 514. The Protocol adopted by the Hague Convention was subsequently rejected by the United States because its revised limitation of $16,600 was considered too low and its ticket notice provisions were inadequate. *Id.* at 512-16.

In 1963, the Civil Aeronautics Board enacted a regulation requiring that the Article 3 notice be printed in at least 10 point type. 14 C.F.R. § 221.175(a). The regulation applied to each "air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention". *Ibid.*

The C.A.B. defended its 10 point standard by stating that "lesser notice does not suffice to give adequate notice appropriate in the public interest", Brief for *Amicus* C.A.B. at 9, *Lisi v. Alitalia*, 390 U.S. 455 (1968), and that "[t]he fixing of standards of notice by either the courts or the Board is in nowise inconsistent with Warsaw." Brief for Appellee C.A.B. at 36, *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 917 (D.C. Cir. 1973).

In November 1965, continuing dissatisfaction led the United States to denounce the Convention, effective six months later. *See Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 252 & n. 22. On the eve of the effective date in May 1966, faced with the prospect of losing the limitation entirely, international airlines drafted the Montreal Agreement. As a "special contract" under Article 22(1) of the Convention, the Agreement "incorporates all other provisions of the Convention." Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 597 (1967).

The Agreement added the terms demanded by the United States: (1) the Warsaw limitation was raised to $75,000; (2) the defense available to the carrier under Article 20(1), that "all necessary measures" were taken to avoid the accident, was waived, and; (3) airlines stipulated that they would issue a ticket with an Article 3 notice printed in at least 10 point type, as set forth in the C.A.B. regulation.

As a result of the airlines' contractual commitment, the United States formally accepted the Agreement and withdrew its denunciation. *Id.* at 596. All foreign airlines must sign the Agreement as a condition of their Foreign Air

Carrier Permit to conduct business in the United States. 14 C.F.R. § 213.7. KAL signed in 1969.

2. The decisions in *Polish Airlines* and *New Orleans Disaster* are compelling

Polish Airlines held that the obligations an airline accepts under the Montreal Agreement must be considered along with Article 3 of the Convention:

> Under the Convention, the carrier must deliver a ticket containing, *inter alia*, a statement referring to the liability rules. Article 3(1)(e). Under the modifying terms of the Montreal Agreement, however, that statement must be in 10 point type. 705 F.2d at 89.

The Montreal Agreement supplemented the Warsaw Convention by adding those terms demanded by the United States in exchange for its continued participation in the Treaty. As the Second Circuit observed, "adequacy of notice was one of the concerns that led to the filing of the Notice of Denunciation . . . and . . . the Montreal Agreement specifically addressed this concern by requiring 'notice to each passenger in large type' ". 705 F.2d at 89-90. The United States relied upon this promise by withdrawing its Notice of Denunciation and continuing as a party to the Treaty. If the world's airlines had not signed the Agreement, "there would in all probability be no Convention today." 705 F.2d at 91.

With the 10 point requirement, the airlines stipulated to a clear and uniform minimum standard for an acceptable Article 3 notice. Delivery of a notice in less than 10 point type is inadequate as a matter of law:

> The 10 point guideline is a clear one, and quite easy to follow. To be sure, any such line drawing has an arbitrary air, but LOT is a party to the line drawn and it seems to us less arbitrary to accept the 10 point standard than it would be to guess on a case-by-case basis at what constitutes "adequate notice". 705 F.2d at 90 n. 10.

See also New Orleans Disaster, 789 F.2d 1092, 1098 ("10 point type means exactly that, 10 point type.").

The Second Circuit also recognized the rulemaking authority granted to the Executive Branch by statute to implement the Warsaw Convention. 49 U.S.C. § 1502. The court found that the promulgation of 14 C.F.R. § 221.175(a) and the negotiation and acceptance of the Montreal Agreement by the United States "indicate a judgment by at least the executive branch that 10 point type was necessary to provide sufficient notice" to the passenger under Article 3. 705 F.2d at 90.

In this regard, *Polish Airlines* is supported by this Court's recent ruling in *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984), which upheld and applied another Civil Aeronautics Board regulation interpreting the cargo limitation of the Warsaw Convention. *Franklin Mint* ruled an Executive Branch determination made pursuant to properly delegated authority is controlling "unless we find it contrary to law established by domestic legislation or by the Convention itself." *Id.* at 254.

The 10 point standard plainly gives substantive effect and meaning to Article 3 of the Convention and its requirement of delivery. Not only has the Executive Branch properly set this minimum standard by regulation, but KAL bound itself to provide such notice by signing the Montreal Agreement.

D. *Korean Air Lines Disaster* is contrary to the *Deutsche Lufthansa* case decided by the same Circuit

The ruling in *Korean Air Lines Disaster* also conflicts with a prior decision of another panel of the District of Columbia Circuit.

In *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973), the German national airline challenged the 10 point ticket notice requirement imposed by the Civil Aeronautics Board as contrary to the Convention. But the District of Columbia Circuit stated that "the provisions of Article 3 may be supplemented by additional regulations" and ruled that the 10 point standard "not only does not contradict the provisions of the Warsaw Convention *but gives [Article] 3(1)(e) substantive effect*." *Id.* at 916, 918 (emphasis added).

The Circuit expressly adopted the Second Circuit ruling in *Lisi v. Alitalia*. *Id.* at 917. And *Deutsche Lufthansa* stated that compliance with the type size requirement will dictate whether the airline may later raise the limitation:

> Compliance with the [10 point type] regulation will not only provide passengers with adequate notice of the limitations on liability imposed on them but will later enable the carrier to invoke the protection of [Article] 3(1)(e), for *unless adequate notice is accorded its passengers, the carrier will later be precluded from using the Convention to limit liability.* *Id.* at 918 (emphasis added).

E. Denial of certiorari would present a serious problem for the transferor courts

As discussed in Section II, *infra*, eleven actions should be transferred back to New York district courts at the end of pretrial proceedings pursuant to 28 U.S.C. § 1407. *Korean Air Lines Disaster* expresses its belief that the law of the case should govern after the cases are returned. App. A, *infra*, p. A-11; 829 F.2d at 1176. But the New York courts are bound to apply the decisions of the Second Circuit in *Polish Airlines* and *Lisi v. Alitalia*. *Ithaca College v. N.L.R.B.*, 623 F.2d 224 (2d Cir. 1980) (a decision of the court of appeals, not overruled by the Supreme Court, is binding on all inferior courts and litigants within the Circuit).

If this Court declines to decide the Warsaw/Montreal issue, the New York district courts would find themselves "suspended between the doctrine of stare decisis and the doctrine of the law of the case. In such a circumstance the . . . court would invite reversal if it did not follow the decisions of its own courts of appeals." 1B J. Moore, *Moore's Federal Practice* ¶ 0.404[4.-2], p. 129 (2d ed. 1987).

F. *Korean Air Lines Disaster* lacks precedent in support of its Warsaw holding and should be reversed

The sole decision cited favorably by *Korean Air Lines Disaster* was a Canadian Supreme Court ruling: *Ludecke v. Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979). App. A, p. A-34; 664 F. Supp. at 1474. But *Ludecke* did not involve a ticket governed by the Montreal Agreement or 14 C.F.R. § 221.175(a). And *Ludecke* is contrary to the uniform decisions of American courts

over the past two decades in *Lisi v. Alitalia*, *Deutsche Lufthansa*, *Polish Airlines* and *New Orleans Disaster*.

Korean Air Lines Disaster overlooked the language and purpose of Article 3 of the Convention that "unless adequate notice is accorded its passenger, the carrier will later be precluded from using the Convention to limit liability." *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 918 (D.C. Cir. 1973). The opinion does not address the historical relationship between the Convention and the Agreement and the United States' efforts to set a minimum warning standard. *Polish Airlines*, 705 F.2d at 89-90; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 *Harv. L. Rev.* 497, 599 (1967). Nor does it recognize the authority of the Executive Branch to impose the 10 point minimum standard, *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984), or that the standard gives "substantive effect" to the Convention's notice requirements. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 918 (D.C. Cir. 1973).

International airlines routinely comply with their obligations and gain the limitation by performing the simple mechanical act of issuing notices in at least 10 point type. Such notice is the only measure of protection afforded to passengers in return for the limitation. *Korean Air Lines Disaster* should be reversed to restore the *quid pro quo* of the Warsaw/Montreal system.

II

THIS COURT MAY DESIRE TO CONSIDER AN ADDITIONAL QUESTION CONCERNING THE SUBSTANTIVE FEDERAL LAW TO BE APPLIED FOLLOWING A TRANSFER FOR PRETRIAL PROCEEDINGS

If this Court grants certiorari to decide the Warsaw/Montreal question, the second issue will become moot. Nevertheless, the issue is the subject of a conflict among the Circuits and the Court may desire to address the issue to provide needed guidance in future cases.

A. *Korean Air Lines Disaster* conflicts with numerous authorities which hold that following a transfer for pretrial proceedings, the transferee court is bound to apply the substantive federal law of the transferor circuit

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Supreme Court held that following a 28 U.S.C. § 1404 transfer of a diversity case, the transferee court was bound to apply the substantive law of the transferor court. *Van Dusen* reasoned that a "change of courtrooms" should not "significantly affect the outcome of the case." *Id.* at 639 & n. 40.

Korean Air Lines Disaster limited the scope of *Van Dusen* to questions of state law. App. A, *infra*, p. A-6 to A-11; 829 F.2d at 1174-76. But the vast majority of courts facing this issue have held otherwise and applied *Van Dusen* to federal law issues. *Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 408 (2d Cir. 1975) (as to a federal securities law issue: "Since this case was brought in a district court in the Fifth Circuit, the substantive law of

that circuit is the law we must consider here."); *In re Haven Industries*, 462 F. Supp. 172, 179 (S.D.N.Y. 1978) (as to a federal securities law issue: "As the transferee court in this multidistrict litigation, this court must apply the law of the transferor forum."); *Stirling v. Chemical Bank*, 382 F. Supp. 1146, 1150 n. 5 (S.D.N.Y. 1974) (as to a federal securities law issue: "This Court must apply the substantive law of the transferor forum."); *In re Four Seasons Securities Laws Litigation*, 370 F. Supp. 219, 228 (W.D. Okla. 1974) (as to a federal bankruptcy law issue: "In cases transferred under 28 U.S.C. § 1407(a) the substantive law of the transferor forum applies after transfer."); *In re Plumbing Fixtures Litigation*, 342 F. Supp. 756, 758 (J.P.M.L. 1972) (as to a federal antitrust law issue: "It is clear that the substantive law of the transferor forum will apply after transfer . . ."); *Philadelphia Housing Authority v. American Radiator*, 309 F. Supp. 1053 (E.D. Pa. 1969) (as to a federal antitrust law issue: "the applicable law to be applied in Section 1407 transfers is the law of the transferor district.").

Korean Air Lines Disaster conflicts with this line of authority and holds that a transfer for pretrial proceedings may result in a change of substantive federal law.[12] App. A, *infra*, p. A-7; 829 F.2d at 1174.

12 At the oral argument of plaintiffs' motion, the district court judge stated that with regard to the cases filed in New York "I know that I am bound by the Second Circuit." Subsequently, in a decision rendered on a separate Warsaw issue involving a case transferred from the Ninth Circuit, the district court held that under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), it was bound to apply the law of the transferor Ninth Circuit. *In re Korean Air Lines Disaster*, 664 F. Supp. 1478, 1480 (D. D.C. 1986). The *Van Dusen* issue was not addressed by the district court in its first opinion on the Warsaw/Montreal ticket issue despite the fact that it was briefed and argued by the parties. Subsequently, the Court of Appeals specifically remanded for further findings related to *Van Dusen*. The district court then reversed itself, and held that the *Van Dusen* rule did not apply to federal law issues. App. A, *infra*, pp. A-67 to A-70; 664 F. Supp. 1488-90.

B. Contrary to the rationale of this Court's ruling in *Van Dusen*, *Korean Air Lines Disaster* rewards the defendant for forum shopping

Korean Air Lines Disaster defeats the rationale of *Van Dusen* by rewarding KAL for forum shopping. A transfer for pretrial proceedings under 28 U.S.C. § 1407 "does not justify the rather startling conclusion that one might 'get a change in law as a bonus for a change of venue'." *Van Dusen*, 376 U.S. at 636.

Eleven plaintiffs on this appeal filed in New York, where six of them resided, where flight 7 departed, where KAL issued nearly all of the defective tickets and where KAL conducts regular flights. But soon after the disaster, KAL realized that it had issued the small print tickets to many passengers. It quickly sought a Section 1407 transfer to the District of Columbia, which had no connection to flight 7, KAL's flight operations, any KAL witnesses or the plaintiffs.[13] KAL's attempt to avoid the application of *Polish Airlines* and *Lisi v. Alitalia* is obvious.

Korean Air Lines Disaster, however, does not address the forum shopping considerations of *Van Dusen*.

13 The Multidistrict Panel granted KAL's motion not on the grounds of any convenience of the District of Columbia to the airline, but because of the Panel's belief that discovery would be conducted of government agencies located in the District. *In re Korean Air Disaster*, 575 F. Supp. 342 (J.P.M.L. 1983).

C. *Korean Air Lines Disaster* undermines the multidistrict transfer system

The purpose of 28 U.S.C. § 1407 is to "promote the just and efficient conduct" of complex actions. A Section 1407 transfer may be made to *any* district regardless of federal venue requirements. The transfer determination under Section 1407 is often based on court case loads and the availability of a particular district judge.

The Multidistrict Panel certainly did not believe that its transfer would result in a change of the applicable law. *In re Plumbing Fixture Cases*, 342 F. Supp. 756, 758 (J.P.M.L. 1968); *see Manual for Complex Litigation, Second* § 31.122, p. 254 n. 25.

But *Korean Air Lines Disaster* granted KAL a substantive law benefit resulting from its transfer for mere discovery convenience. If this ruling is allowed to stand, courts "would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum." *Van Dusen*, 376 U.S. at 636.

Prior to *Korean Air Lines Disaster*, every multidistrict case which addressed whether this Court's holding in *Van Dusen* applied to federal law questions has respected the law of the transferor Circuit. This is undoubtedly because 28 U.S.C. § 1407 contemplates that the case will eventually be returned to the transferor court for trial. But *Korean Air Lines Disaster* threatens the proper working of the multidistrict transfer system by allowing a change in courtrooms to change the ultimate outcome of the case.

CONCLUSION

Certiorari should be granted to address the conflict among the Circuits created by *Korean Air Lines Disaster* on the proper interpretation of the Warsaw Convention and Montreal Agreement.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals for the
District of Columbia Circuit

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982

IN RE: KOREAN AIR LINES DISASTER OF
SEPTEMBER 1, 1983

PLAINTIFF'S STEERING COMMITTEE, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Misc. No. 83-00345)

Argued January 20, 1987

Decided September 25, 1987

Milton G. Sincoff, with whom *Donald W. Madole* and *Steven R. Pounian* were on the brief for appellant.

George N. Tompkins, Jr. for appellee.

Before: RUTH B. GINSBURG, WILLIAMS, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Concurring opinion filed by *Circuit Judge* D.H. GINSBURG, in which *Circuit Judge* WILLIAMS joins.

GINSBURG, RUTH B., *Circuit Judge*: This case arises out of an air disaster and raises turbulent federal questions. On September 1, 1983, Korean Air Lines (KAL) Flight 007, a commercial craft departing from Kennedy Airport in New York and bound for Seoul, South Korea, was destroyed over the Sea of Japan by Soviet Union military aircraft. Wrongful death actions were filed against KAL in several federal district courts; the Judicial Panel on Multidistrict Litigation transferred these actions to the District Court for the District of Columbia for pretrial proceedings pursuant to 28 U.S.C. § 1407 ("[C]ivil actions involving one or more common questions of fact . . . pending in different districts . . . may be transferred to any district for coordinated or consolidated pretrial proceedings.").

The nub of the controversy relates to the per passenger damage limitation of the Warsaw Convention,[1] raised to $75,000 by an accord among airlines known as the Montreal Agreement.[2] By motion for partial summary judgment, plaintiffs sought a declaration "that [KAL] is liable without fault for compensatory damages without any limitation of $75,000." Joint Appendix (J.A.) at 26. Plaintiffs grounded this motion on the inadequate type size of the liability limitation notice printed on KAL passenger tickets. The notice appeared in 8 point type; the Montreal Agreement specifies 10 point type. Denying plaintiffs' motion, the district court, on July 25, 1985,

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982).

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 FED. REG. 7302 (1966) (approved by CAB Order E-23680, May 13, 1966).

held that KAL could avail itself of the $75,000 per passenger limitation. *In re Korean Air Lines Disaster of September 1, 1983*, 19 Av. L. Rep. (CCH) 17,584 (D.D.C. 1985). In so ruling, the district court considered and rejected contrary Second Circuit precedent: *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983).

On September 24, 1985, the district court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question whether KAL "is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets." We ruled that the requirements of section 1292(b) were met and that "wise exercise of our discretion dictates that the appeal be allowed." D.C. Cir. Order filed April 8, 1986.

On January 30, 1987, after argument of the appeal, we remanded the record for clarification of the scope of the district court's order denying plaintiffs' partial summary judgment motion. Specifically, we observed that the cases consolidated in this appeal

> can be grouped into three categories on the basis of the fora in which they were originally filed and to which they are to be remanded at or before the conclusion of pretrial proceedings, unless the actions are earlier terminated: (a) the Southern and Eastern Districts of New York; (b) the Eastern District of Michigan and the District of Massachusetts; and (c) the District of Columbia. The district judge, in his order denying plaintiffs' motion for partial summary judgment, did not expressly consider the contention that, by analogy to the principle set forth in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), he was bound by Second Circuit precedent in resolving the claims of plaintiffs in the first category enumerated above.

> The extent of a transferee court's authority under 28 U.S.C. § 1407 independently to resolve issues of [federal] law already passed upon by the federal court of appeals for the circuit in which the transferor forum is located is apparently a question of first impression, and our consideration of this issue is hampered by uncertainty as to which plaintiffs were covered by the district court's July 1985 order.

D.C. Cir. Order filed January 30, 1987.

By Memorandum dated May 7, 1987, the district court held that its July 25, 1985 decision denying plaintiffs' partial summary judgment motion applies to all three categories of cases described in this court's January 30, 1987 remand-for-clarification order. We now affirm the district court's dispositions. On the Warsaw Convention/Montreal Agreement $75,000 per passenger damage limitation issue, we adopt as our opinion the comprehensive July 25, 1985 Memorandum of the district court, and we reprint that disposition as an appendix hereto. We set out below our reasons for concluding that the district court properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in all actions, including those transferred from district courts within the Second Circuit.

The Supreme Court, in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), addressed and resolved this question: when a defendant in a diversity action moves for a venue transfer under 28 U.S.C. § 1404(a),[3] which state's law applies post-transfer? The state law that would have applied in the transferor court adheres to the case, the Supreme Court held; in the Court's words, "with respect

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[3] Under this change of venue prescription, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

to state law," the venue change will accomplish "but a change of courtrooms." *Van Dusen*, 376 U.S. at 639.[4]

The *Van Dusen* interpretation of 28 U.S.C. § 1404(a), as the latter applies in diversity actions, rests on principles advanced in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and cases in the *Erie* line. *Van Dusen*, 376 U.S. at 637-40; *see particularly Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 387 (1941) (on issues of state law arising in diversity cases, federal courts must apply choice-of-law rules of states in which they sit). Justice Goldberg explained for the Court in *Van Dusen*:

> [O]ur interpretation [of § 1404(a)] . . . is supported by the policy underlying *Erie*[.] . . . [W]e should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. . . . What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the

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[4] The *Van Dusen* Court expressly did not decide whether the law of the state in which the transferor court sits would apply if plaintiff rather than defendant sought the transfer, or if a state court in the transferor court's state would dismiss the case on forum non conveniens grounds. *Van Dusen*, 376 U.S. at 640. Wright, Miller & Cooper indicate that several courts have applied the law of the transferor court even when plaintiff rather than defendant, moves for a transfer. 15 C. WRIGHT, A. MILLER & E. COOPER, *Federal Practice and Procedure* § 3846, at 367 (2d ed. 1986). A strong argument, however, favors application of the law of the transferee state in such instances. *See* ALI, *Study of Division of Jurisdiction Between State and Federal Courts*, § 1306(c) & commentary (1969).

case and the courts of the State in which the action was filed.

Van Dusen, 376 U.S. at 637-39 (footnotes omitted).

Defendants in *Van Dusen* sought to transfer the case from the Eastern District of Pennsylvania to the District of Massachusetts. (Massachusetts, but not Pennsylvania, limited the damages plaintiffs could recover.) Were the transfer to be made, the Supreme Court ruled, though all further proceedings would take place in the Massachusetts district court, Pennsylvania law, not Massachusetts law, would furnish the governing state prescriptions.

The question before us is whether the *Van Dusen* rule—that the law applicable in the transferor forum attends the transfer—should apply to transferred federal claims. It is a question meriting attention from Higher Authority. Congress, it appears, has not focused on the issue,[5] nor has the Supreme Court addressed it. The Judicial Panel on Multidistrict Litigation assumed, on at least one occasion, that the *Van Dusen* rule would apply to transferred federal claims, *see In re Plumbing Fix-*

[5] In Senate hearings on the bill that eventually became the multidistrict litigation statute, two witnesses stated that *Van Dusen* would apply to choice-of-law issues under the measure. The experience of those witnesses related to federal claims for antitrust law violations and it may be that they intended their statements to cover such claims. *See Multidistrict Litigation: Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 13, 25 (1966) (statements of Dean Phil Neal and Judge William Becker). The Supreme Court, however, in explicit and repeated qualifications, confined its *Van Dusen* opinion to questions of state law. *See* 376 U.S. at 625-26, 630, 633, 635, 639. The snippet of legislative history just described, therefore, is at best equivocal; the two witnesses perhaps "mean[t] only that *Van Dusen* would apply to state law issues in cases transferred under the new statute." Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 710-11 (1984).

tures Litigation, 342 F.Supp. 756, 758 (J.P.M.D.L. 1972),[6] but the Panel, from what we can glean, has given the matter only fleeting consideration.[7] Recognizing that the question is perplexing, particularly in the context of 28 U.S.C. § 1407, a statute authorizing transfers only for pretrial purposes, we are persuaded by thoughtful commentary that "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit." Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 721 (1984); *see also* Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 662-706 (1987).

As the district court stressed in response to our remand, the *Erie* policies served by the *Van Dusen* decision do not figure in the calculus when the law to be applied is federal, not state. Given the reality of conflict among the circuits on the proper interpretation of federal law, however, why deny to a plaintiff with a federal claim the "venue privilege" a diversity claimant enjoys? Plaintiffs in the *Van Dusen* situation could effectively pick Pennsylvania rather than Massachusetts law and retain the benefit of that choice after transfer. Why deny a similar right of selection and retention to plair tiffs who would fare better under the Second Circuit

[6] In *Plumbing Fixtures*, a plaintiff resisted § 1407 transfer of his price-fixing claim on the ground that under transferee forum precedent, his standing to sue would be rejected. The Panel stated, with no elaboration: "It is clear [under *Van Dusen*] that the substantive law of the transferor forum will apply after transfer." 342 F.Supp. at 758.

[7] Several lower courts have also declared, without exposition, that *Van Dusen*'s reasoning would apply to transferred federal claim cases. *See* Marcus, *supra* note 5, 93 YALE L.J. at 692-93 & n.100 (citing cases). Other lower courts have stated that *Van Dusen* does not apply to transferred federal claims. *Id.* at 693 n.102 (citing cases).

interpretation of federal law than under the D.C. Circuit's interpretation?

The point has been cogently made that venue provisions are designed with geographical convenience in mind, and not to "guarantee that the plaintiff will be able to select the law that will govern the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 n.24 (1981); *see* Marcus, *supra*, 93 YALE L.J. at 696-701. In diversity cases, however, federal courts are governed by *Klaxon* and therefore may not compose federal choice-of-law principles; instead, they must look to state prescriptions in determining which state's law applies. With "no federal choice-of-law principles that favor the application of the law of one state over the law of another," the diversity plaintiff's opening move or "venue privilege" ordinarily fills the gap—it "prevails by default." Marcus, *supra*, 93 YALE L.J. at 700-01. For the adjudication of federal claims, on the other hand, "[t]he federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law," *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963); there is no compelling reason to allow plaintiff to capture the most favorable interpretation of that law simply and solely by virtue of his or her right to choose the place to open the fray.

As summarized in the commentary we find persuasive:

> The *Van Dusen* Court stressed the venue privilege because [under *Klaxon*] there is no federal principle by which to select the state law that should govern diversity cases. Where federal claims are transferred, however, the principle that the transferee federal court is competent to decide federal issues correctly indicates that the transferee's interpretation should apply.
>
> . . .
>
> For federal courts, the most significant choice-of-law difference between issues of state law and issues

> of federal law is that they lack competence to [develop rules of decision for] the former and are presumptively competent to decide the latter. . . . [T]he federal courts have not only the power but the duty to decide [issues of federal law] correctly. There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job.

Marcus, *supra*, 93 YALE L.J. at 679, 702; *see also* Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 412 (1972) ("I take [*Van Dusen*] to be limited to choices of *state* law.") (emphasis in original).

Application of *Van Dusen* in the matter before us, we emphasize, would not produce uniformity. There would be one interpretation of federal law for the cases initially filed in districts within the Second Circuit, and an opposing interpretation for cases filed elsewhere. Applying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings. Indeed, because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory. Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.[8]

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[8] Even if it appears plausible to legal minds to mete out in a consolidated case one version of federal law to plaintiffs

The district judge in the instant case observed that

> [i]f . . . more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this [way] is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

May 7, 1987 D.D.C. Memorandum at 4. We agree. The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit.

We return, finally, to the most anomalous feature of this case. As earlier observed, we deal here not with an "all-purpose" transfer under 28 U.S.C. § 1404(a), but with a transfer under 28 U.S.C. § 1407 "for coordinated or consolidated pretrial proceedings." We have held, in accord with the district court, that the law of a transferor forum—here, the law of the Second Circuit—merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit. Should the several cases consolidated for pretrial preparation in the instant proceeding eventually return to transferor courts outside this circuit,[9] would our district court's

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whose counsel filed in the Southern or Eastern District of New York, another to plaintiffs whose counsel filed in the District Court for the District of Columbia, it would be difficult to explain the rationality of such divergencies to the lay persons served by the federal judicial system.

[9] In practice, it has been reported, most cases transferred under § 1407 are not remanded. *See* 1986 Ann. Rep. Director Admin. Off. U.S. Courts 128 (as of June 30, 1986, 15,026 actions had been subject to § 1407 proceedings; of those, 10,903 had been terminated by the transferee court); Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 667 & n.247, 700 & nn.410, 411 (1987); Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts, and Transferee Courts*, 78 F.R.D. 575, 583 (1978).

Warsaw Convention/Montreal Agreement ruling, which we have affirmed, have binding force? We believe it should, as "law of the case," for if it did not, transfers under 28 U.S.C. § 1407 could be counterproductive, *i.e.*, capable of generating rather than reducing the duplication and protraction Congress sought to check. *See* Steinman, *supra*, 135 U. PA. L. REV. at 664-67, 700-704. On this issue in the case at hand, however, our circuit is not positioned to speak the last word.

We affirm the order of the district court that KAL is entitled to avail itself of the limitation on damages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and we note again that the proper interpretation of the Convention and Agreement, as well as the scope of the transferee court's interpretive authority in a case such as this one, are matters in need of definitive resolution for our national court system.

Affirmed.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Civil Action Nos. 83-2793, 83-2941, 83-3154, 83-3177, 83-3204, 83-3441, 83-3445, 83-3448, 83-3449, 83-3450, 83-3451, 83-3452, 83-3453, 83-3454, 83-3455, 83-3456, 83-3457, 83-3458, 83-3459, 83-3460, 83-3461, 83-3462, 83-3463, 83-3464, 83-3465, 83-3466, 83-3467, 83-3468, 83-3469, 83-3470, 83-3473, 83-3474, 83-3587, 83-3588, 83-3792, 83-3793, 83-3889, 83-3891, 83-3898, 83-3901, 83-3902, 83-3903; 84-0029, 84-0030, 84-0402

MEMORANDUM AND ORDER

INTRODUCTION

Before the Court is a motion for summary judgment on the sole issue of the enforceability of the limitation on damages established by the Warsaw Convention (Convention)[1] and asserted by Defendant Korean Air Lines Co., Ltd. (Korean Air Lines) in the above-captioned multidistrict litigation. These Plaintiffs argue that, as a matter of law, Korean Air Lines is liable to them to the full extent of their damages for having delivered defective tickets to their decedents, passengers killed when a commercial airliner (KAL 007) owned and operated by Defendant was tragically destroyed by Soviet military aircraft over the Sea of Japan.

The material facts are undisputed. Defendant delivered tickets to Plaintiffs' decedents before their "international transportation" began. The tickets contained notice of the applicability of the Warsaw Convention's rules limiting Korean Air Lines' liability. The notice was printed in 8.0 type size. Since the passenger tickets at issue included a point of origin, destination or stopping place within the United States, the provisions of the Montreal Intercarrier Agreement (Montreal Agreement),[2] are also relevant. The question before the Court is whether the failure to print notice to passengers of the applicability of the Warsaw Convention in 10-point modern type size, as required by the Montreal Agreement, strips the carrier of the Convention's liability limitation. Having considered the treaty, its history and development, and all evidence presented, the Court concludes that the carrier cannot be prevented from availing itself of the limitation; Plaintiffs' motion shall be denied.

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982).

[2] Agreement Relating to Liability Limiations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 FED. REG. 7302 (1966) (approved by CAB Order E-23680, May 13, 1966).

HISTORY OF THE WARSAW CONVENTION

Before considering this motion, it is necessary to clearly understand the Warsaw Convention. It is a multilateral treaty intended to uniformly regulate international airline transportation. Today, more than 120 nations adhere to the rules contained in the Convention. Originally negotiated at two international conferences, the first in Paris in 1925 and the second in Warsaw in 1929, the Convention had a dual purpose. In recognition of the fact that the newly emerging air industry woul link many nations of divergent systems and laws, the first goal was to establish some degree of uniformity as to documentation for tickets and the like and as to the procedure and substantive rules of law which would govern claims arising out of international transportation by air. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967). In order to help the then fledgling air industry to attract needed capital, the second goal was to limit the potential liability of the air carriers in the case of accidents. Clearly recognized as the more important goal of the Convention, in Article 22(1), the limitation on liability was set at 125,000 Poincare francs, or approximately 8,300 United States dollars.[3] In exchange for the limitation, the Warsaw Convention, in Article 20, created a rebuttable presumption of air carrier liability unl "he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Article 25 then provided that, in cases where a plaintiff is able to

[3] The actual amount was $8,291.87. Block v. Compaignie Nationale Air France, 386 F.2d 323, 325 (5th Cir. 1967). Article 22(4) of the Convention provides that "The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

prove "willful misconduct" the carrier will not be entitled to avail himself of the limitation on liability.

On July 31, 1934, the United States deposited its instrument of adherence to the Warsaw Convention in the archives of the Ministry of Foreign Affairs of Poland in accordance with the procedure set forth in Article 37 of the treaty. At the time the Senate ratified the treaty, notably during the time this country (and the world) was in the midst of the Great Depression, the $8,300 amount of the limitation was thought to provide some benefit to both passengers and carriers. Indeed, Secretary of State Cordell Hull transmitted the Warsaw Convention to the Senate with the following statements:

> It is believed that the principle of limitation will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934). Therefore, at the time of ratification, the principle and the amount of limitation were assented to by the United States. Since that time and especially with the growth of the air industry to its present proportions, the limitation has become an increasingly uncomfortable and unpopular proposition.

While the limitation was once accepted, it has constantly been the focus of debate and disagreement. The

United States, although adhering to the uniform rules relating to international transportation, has not been satisfied with the low limits placed on air carrier liability. As early as 1935, one year following United States adherence, there was discussion of possible amendment to the Convention. Lowenfeld & Mendelsohn at 502. As a result of the alarm expressed by the United States and other nations where full recovery for personal injury and wrongful death had become the rule, discussions and proposals for change continued until another conference met in September 1955. Convened this time at the Hague, the stated goal was to resolve the debate concerning whether the liability limits had been set at an appropriate level. Lowenfeld & Mendelsohn at 504. The Hague Conference, therefore, had a limited purpose with the intent being to retain uniformity in the rules and conditions expressed in the Warsaw Convention while resolving the dissatisfaction with the low limits of liability. S. SPEISER & C. KRAUSE, 1 *Aviation Tort Law* 670-74 (1978).

Through much negotiation and debate the Hague Protocol did, among other things, double the limitation to $16,600. Nonetheless, the outcome of the Hague conference failed to resolve the dissatisfaction; the United States never ratified the Hague Protocol. In fact, the amendments to Warsaw were never presented to the Senate for ratification, since even the increased limitation faced an unpleasant political climate. Lowenfeld & Mendelsohn at 515. The limitation amount therefore remained at $8,300 in this country.

Discontent continued for another decade. Then, in 1965, the United States determined that the Warsaw limitation could no longer be tolerated and decided to denounce the treaty. Deposited November 15, 1965 and in accordance with Article 39, set to become effective six months later, the State Department Press Release concerning the Notice of Denunciation stated that "the United States wishes to make clear that the action to denounce the Warsaw Convention is taken *solely* because of the Convention's low limits of liability for injury or death to passengers, and in no way represents a departure from the longstanding commitment of the United States to the tradition of international cooperation in matters relating to civil aviation." 53 Dept. State Bull. 923, 924 (1965) (emphasis added). The Notice continued to state clearly that the threat of denunciation would be withdrawn if the limitation were raised, by special contract or otherwise, to preferably $100,000 but not less than $75,000.

The Montreal Agreement was adopted in response to the United States' decision to withdraw from the Warsaw Convention. Unlike the Hague Protocol, the Montreal Agreement did manage to calm the din of criticism of the low limits which had, by 1965, "reached a crescendo." S. SPEISER & C. KRAUSE at 674. In order to avert United States denunciation of the treaty, air carriers agreed to raise the limitation amount to $75,000 and to submit to virtual strict liability; the Montreal Agreement provides that an air carrier "shall not . . . avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by [Hague] Protocol." In addition, the Agreement provided that the "Montreal Advice" would be printed in 10-point type and in ink contrasting with the ticket stock. However, the Montreal Agreement is completely silent with respect to sanctions to be imposed for failure to comply with any of its three provisions.

Contrary to the view that waiver of the limitation was contemplated, the Montreal Agreement was entered into to *preserve* the limitation. Intended only as an interim agreement until the treaty could be amended, the Montreal Agreement achieved a stand-off on the issue of the level of the limitation. By its very terms, the Agreement is only a "special contract" under the Warsaw Convention. It applies to "international transportation" as defined in Article 1(2) which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. While leaving air carriers liable without

fault, the Agreement permits air carriers to avail themselves of the liability limitation found in Article 22(1); however, the amount of the limitation is increased to $75,000 and the defenses found in Article 20(1) have been waived.

Although the increase from $8,300 to $75,000 was significant, the fact remains that the United States will probably never be satisfied with any amount as a limit upon recovery. Therefore, while the debate has been phrased in terms of the "appropriate" level of the limitation, *see, e.g.*, Lowenfeld & Mendelsohn at 504, it is the very idea of any limit at all which has been and remains the problem. The United States has consistently rejected all limitation amounts; it certainly appears that "no convention with a limitation of damages can possibly pass the Senate of the United States." Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528, 529 (1967).

ISSUES PRESENTED

At issue is the interpretation of Article 3 of the Warsaw Convention which provides:

> (1) For the transportation of passengers the carriers must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity; and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;

> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. ***Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.***

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982) (emphasis added).

Originally, Plaintiffs based their motion on a claim that the Montreal Agreement modified these provisions of the Convention so as to require air carriers to deliver to passengers embarking on "international transportation" tickets containing notice of the applicability of the Warsaw Convention in at least 10-point type size in order to limit their liability. It is Plaintiffs' position that the Montreal Agreement also "modified" the treaty provisions relating to the amount of the limitation, raising it from $8,300 to $75,000. Further, Plaintiffs argue that a carrier's failure to print the Montreal Advice in at least 10-point type constitutes "non-delivery" of a ticket under Article 3(2) and therefore triggers the treaty sanction—forfeiture of the limitation for air carrier liability.

In a subsequent pleading, Plaintiffs changed the focus of their argument from a claim that the Convention was modified in Montreal to a claim that the Warsaw Convention is not applicable at all because "Korean Air Lines, a corporate citizen of a nation not a party to the Warsaw Convention, has no standing to avail itself of

the defenses contained in the Warsaw Convention." Plaintiffs' Reply Brief at 3. This argument is based on the notion that there is no treaty relationship between the Republic of Korea and the United States and that, therefore, the Convention cannot apply to an air carrier incorporated in Korea. Plaintiffs contend that the absence of a treaty relationship with Korea, if indeed there is no such relationship, prevents Korean Air Lines from asserting the Warsaw Convention limitation on liability. However, if Plaintiffs are correct and the applicability of the Convention rests on the existence of reciprocal ratification by Korea and there has been no such ratification, then, not only would Korean Air Lines be precluded from claiming the limitation, the Court would be altogether precluded from exercising jurisdiction over the air carrier.

Korean Air Lines vigorously opposes the motion for partial summary judgment. Under either of the somewhat contradictory theories posited by Plaintiffs, Defendant claims that the Montreal Agreement, being an agreement between air carriers, not nations, cannot modify the Warsaw Convention to require or trigger the imposition of the treaty sanction of unlimited liability. Further, Korean Air Lines argues that the United States and the Republic of Korea do maintain a treaty relationship with respect to the Convention; consequentl Plaintiffs' second theory cannot be correct.

By challenging Korean Air Lines' statement that "the rights of the moving plaintiffs and defendant KAL are governed exclusively by the provisions of a treaty of the United States known as the Warsaw Convention," Plaintiffs' second theory impugns the jurisdiction of the Court. The challenge to "treaty jurisdiction" affects not only the actions filed by these Plaintiffs, but this entire multidistrict litigation. Therefore, the question concerning jurisdiction and the requirement of a treaty relationship with Korea must be examined before proceeding to the issue of the applicability of the Warsaw Convention limitation on liability.

JURISDICTION UNDER THE WARSAW CONVENTION

Article 1(1) provides that "[t]his Convention shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire." Article 17 of the Convention makes the carrier liable for the death or personal injury of passengers sustained while engaged in international transportation. Article 24 of the Convention further states that cases brought for damages sustained in the event of wounding of passengers "can only be brought subject to the conditions and limits set out in this convention"; Article 32 emphasizes this point by stating that the parties are prevented from "deciding the law to be applied" or "altering the rules as to jurisdiction." Therefore, nations which are parties to the Warsaw Convention have agreed that actions for wrongful death or personal injury occurring during "international transportation" will be governed by the rules of the Convention.

As a treaty of the United States and, therefore, the "supreme Law of the Land," U.S. Const. art. VI, the Warsaw Convention preempts other laws. Since the Warsaw Convention applies to "international transportation" and since the United States has agreed to this treaty, as "supreme Law of the Land" the Convention exclusively and specifically controls the recovery which plaintiffs seeking damages for wrongful death or personal injury occurring during "international transportation" may receive in American courts. *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983). The Convention also governs the question of jurisdiction; therefore, the Court must look to the terms of the Convention to determine its applicability.

By its terms, the Warsaw Convention applies only to "international transportation," defined in Article 1(2) as

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to tl sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

The four conditions specified in Article 28(1), *i.e.*, domicile of the carrier, principal place of business, place where the ticket was purchased or the place of destination, are generally thought to control jurisdiction once "international transportation" has been established. *See, e.g., Vergara v. Aeroflot "Soviet Airlines"*, 390 F. Supp. 1266; 1269 (D. Neb. 1975); *Smith v. Canadian Pacific Airways, Ltd.* 452 F.2d 798 (2d Cir. 1971); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). There being no genuine issue respecting either Article 1(2) or Article 28(1) for the tickets relevant to this motion there sho be no question that the Warsaw Convention applies to these actions and that there is treaty jurisdiction in this Court. However, Plaintiffs raise the question of jurisdiction by contending that there is no treaty relationship between Korea and the United States as regards the Warsaw Convention and that the absence of a treaty relationship prevents the Court from exercising any of the Convention's provisions in favor of Defendant, Korean Air Lines, a corporate citizen of Korea. Instead, Plaintiffs would have the Court "enforce" the Montreal Agreement, as though it were a separate contract, without regard to the Warsaw Convention.

Plaintiffs' argument assumes "treaty jurisdiction" is not necessary to maintain these actions. That is incorrect. "If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. § 1331(a), which permits cases *arising under* United States treaties, clearly cannot be established." *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d at 802 (emphasis in original); *accord, In re Air Crash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982). If Plaintiffs are correct, and there is no treaty jurisdiction because there is no treaty relationship, then there is no federal jurisdiction over the Defendant at all.

The Court rejects Plaintiffs' contention that there is no treaty relationship between the United States and Korea. Central to Plaintiffs' argument is the fact that the Republic of Korea adheres to the Protocol Amending the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air (Hague Protocol), 478 U.N.T.S. 371 (1955) rather than to the Warsaw Convention. By distinguishing the Protocol from the Convention as though the two are independent treaties and by arguing that there is no treaty relationship between this nation and Korea, Plaintiffs ignore the development of the Warsaw system. Having considered the history of the Hague Protocol, the Court concludes that the Protocol cannot be considered separately from the Warsaw Convention; it consists of nothing more than a list of amendments to the original treaty. Indeed, the only difference between the titles of the Convention and the Protocol are the very words "Protocol to Amend." The very name of the Hague Protocol gives evidence that it was intended and, in fact, is merely the Warsaw Convention with certain alterations.

Knowing the history of the conference which produced the Hague Protocol and the reasons the United States negotiated and signed but never ratified the Hague Pro-

tocol provides a context for understanding the relationship of the United States to those countries which choose to adopt those amendments. First, since the Protocol came later than the Convention it essentially offered new nations a choice: adopt the Warsaw Convention as originally formulated in 1929 or adopt the amended version as formulated in 1955. The purpose of the Warsaw Convention was to unify the rules; the purpose of the Hague Protocol was merely to amend those same rules. Korea has chosen to adhere to the Hague Protocol and is therefore a High Contracting Party to the Warsaw Convention *through* those amendments. In fact, Article XXIII of the Hague Protocol states:

> Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by the Protocol.

Therefore, since July 13, 1967, Korea has adhered to the Warsaw Convention through its ratification of the Hague Protocol. At least with respect to the unamended portions of the Convention, the United States and Korea are parties to the same treaty.

Moreover, it would hardly encourage the goal of the Warsaw Convention to establish uniform rules, law and procedure for claims arising out of international aviation and then to complicate the application of those rules by requiring reciprocity in ratification. The delegates to the Hague Conference were well aware of this and deliberately adopted the negotiated amendments merely as a Protocol to amend Warsaw rather than as an entirely new convention specifically to retain uniformity. S. SPEISER & C. KRAUSE at 671-72. Plaintiffs' argument fails because "[t]he Convention is not concerned with reciprocal treatment of nationals; its purpose is to unify rules relating to international transportation by air." S. SPEISER & C. KRAUSE at 666.

The negotiations and events which led to the Montreal Agreement were themselves tied to the convention. Plaintiffs' argument that the Montreal Agreement may be considered without resort to the entire Warsaw system of recovery is untenable.

INTERPRETING THE WARSAW/MONTREAL LIMITATION OF LIABILITY

On the issue of maximum liability limits, there has been considerable debate and clash of ideology. Yet more than five decades of discussion have managed to produce no more than an uneasy truce on the issue. The level of the limitation has been tinkered with in hopes of making it more palatable. The United States has been able to force some concessions, principally in the nature of a "special contract"—the Montreal Intercarrier Agreement—increasing the limit for wounding, injury or death occurring during the international transportation of passengers involving a point of origin, point of destination or agreed stopping place in the United States; however, the United States remains unhappy with the concept of a limitation on damages.

While the increase from $8,300 to $75,000 brought about by the Montreal Agreement is certainly significant, evidence of continuing American dissatisfaction with *any* limit is found in the fact that the United States Senate has ratified no Convention, Protocol or Agreement since joining the original Convention. This is true even though the United States has been presented with at least three opportunities to join in treaty amendments to raise the limitation. First, there was the Hague Protocol, and then the proposed Guatemala Protocol.[4] The Guatemala Protocol is drafted so as not to become effective without United States ratification. Although these amendments

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[4] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Doc. No. 8932 (1971), *reprinted in* A. Lowenfeld, Aviation Law Documents Supplement 975-84 (2d ed. 1981).

would have raised the limitation to $100,000, the United States Senate failed to ratify by the required two-thirds margin. The most recent amendments proposed to the Convention were drafted in Montreal. These amendments, known collectively as the Montreal Protocols,[5] would have provided for a maximum recovery of approximately $105,000; still the Senate failed to ratify. *See* 129 CONG. REC. S2237 (daily ed. March 7, 1983); 129 CONG. REC. S2279 (daily ed. March 8, 1983). Having rejected all proposals to date, it certainly seems that t' United States is determined to accept no convention which imposes a limitation on the recovery available to citizens of this country. Therefore, while the debate has been couched in terms of the appropriate level of the limitation, it is the presence of a limitation at all that has been the real concern.

A. *Criticisms of the Treaty Limitation*

There have been two principal criticisms of the Convention's limitations. First, the limitations have been objected to on the ground that the reason for limiting liability in 1929 no longer exists today. In 1929, the limitation was adopted in order to promote a fledgling industry. "The international air giants of today were literally in their swaddling clothes." L. KREINDLER, 1 *Aviation Accident Law* 342 (1963) [hereinafter 1 *Aviation Accident Law*]. Then, the air industry was struggling to become truly international. Capital had yet to be invested and needed encouragement. It was hoped that the limitation on damages would attract capital and allow carriers to obtain insurance that might otherwise be discouraged by the threat of a single catastrophic accident. Lowenfeld & Mendelsohn at 499.

[5] Additional Protocol Nos. 1-4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Nos. 9145-9148 (1975), *reprinted in* A. Lowenfeld, Aviation Law Documents Supplement 985-1001 (2d ed. 1981).

Today, however, the world of aviation is vastly different. In the fifty years since the Convention, air carriers have obtained both the necessary capital and insurance to allow the industry to grow to tremendous proportions. It is now the air industry, not individual members of society, which is best able to bear the burden of loss in cases of catastrophic accidents. Society, having accepted the burden of low recoveries during the industry's infancy, now feels that the risk of loss is better placed on what have grown to be major, mature corporations, often operating as world enterprises, instead of the individual victims. The consensus seems to be that "there is no longer any need to provide special protection to an industry which is capable of reimbursing customers for the damages it causes them." Comment, *The Growth of American Judicial Hostility to the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 830 (1983). Moreover, it has been noted that domestic airlines managed to flourish without a similar limitation placed on liability. 1 *Aviation Accident Law* at 346.

The second, related, criticism of the treaty limitation has been that liability limitations are "an affront to the American ideal of full and adequate compensation to injured plaintiffs by those responsible for the harm." *Id.* American courts operate under the principle that "[i]t is absolutely basic and fundamental . . . that an injured person should be appropriately compensated for the loss he has sustained." KREINDLER, *supra*, 33 J. AIR L. & COM. at 530. Within our system of law, the imposition of a maximum recovery, without regard to the amount of damages which may be proven, is a significant deviation from traditional American tort law principles. *See* 1 *Aviation Accident Law* at 344-45.

The two major criticisms together, that a limitation on tort recovery is anathema to traditional American legal principles and that the air industry has long since

outgrown the need for special protection, combine for a forceful argument against continued application of the liability limits found in the Convention. "It is not insignificant to note however, that the original policy has lost a great deal of its persuasive force; air travel is no longer an infant industry." S. SPEISER & C. KRAUSE at 636-37. Nevertheless, the fact remains that the United States is a High Contracting Party to the Warsaw Convention, complete with treaty limitation. While this may be at variance with traditional tort law, as long as the political branches of our government choose to adh to the Convention, the courts of the nation are obliged to enforce it as it was negotiated and written. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 273; (1984) (Stevens, J., dissenting).

B. *Interpretations of the Treaty Limitation*

It is well established that treaty interpretation involves a consideration of the history and intent of the contracting sovereigns. *Choctaw Nation v. United States*, 318 U.S. 423 (1943). Treaties are to be construed liberally but are not deemed to be abrogated or modified unless such intent has been clearly expressed. "Legislative silence is not sufficient to abrogate a treaty." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. at 252. Further, the Warsaw Convention being a treaty of v untary adhesion, should the political branches of our government determine that the treaty obligations have become more onerous than the foreign policy considerations justify, the treaty's provision for denunciation could be invoked again. For this reason, "[p]lainly, a party to a treaty of voluntary adhesion can have no need for the doctrine of *rebus sic stantibus* [changed circumstances], except insofar as it might wish to avoid the notice requirement [Article 39]." *Id.* at 253 n.24. If the adhering nations have no use of the doctrine, then clearly private parties such as these may not invoke the doctrine on their behalf. *Id.* at 253.

And yet American courts, faced with the prospect of enforcing a limitation which has become outmoded and contrary to domestic law, have taken avoidance of the treaty limitation upon themselves and have arrived at an interpretation of the Warsaw system which, in cases such as those presented by Plaintiffs here, eliminates the treaty limitation altogether. There are two provisions in the Warsaw Convention which, as a sanction, strip the limitation of liability from an air carrier. First, there is the "wilful misconduct" section, Article 25, which excepts from the limitation those cases in which a plaintiff can prove that the accident generating the action was caused by the carrier's "wilful misconduct," which is to be defined by the court of law to which the case is submitted. Since the plaintiff's burden under this provision is a heavy one, this Article provides little ground from which to attack the limitation.

Consequently, the majority of courts have addressed the issue through judicial interpretation of Article 3.[6] This provision has provided much space for judicial maneuverings and innovative interpretations. Specifically, Article 3(2) provides:

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*

(Emphasis added.)

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[6] The limitation has been attacked on constitutional grounds as well, *see, e.g.*, In re Aircrash in Bali, Indonesia on April 11, 1974, 684 F.2d 1301 (9th Cir. 1982); Burdell v. Canadian Pacific Airways, 10 Av. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968).

By providing for unlimited liability where there has been "nondelivery" of a passenger ticket, this Article of the Warsaw Convention has been given a construction, in conjunction with the Montreal Agreement, which eliminates the limitation for many plaintiffs.

1. "Adequate notice"

Construing the phrase "accept a passenger without a passenger ticket having been delivered" to include physically delivered tickets which fail to contain "adequate notice" of the Warsaw/Montreal limitation, courts have made a way for full recovery where there was none. a line of cases beginning with *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965), through the most recently decided *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, *supra*, increasing importance has been placed on the passenger's need to know that in the case of tragedy during international air travel his recovery will be severely limited. "Adequate notice," ordinarily thought of as a domestic legal concept, has been judicially written into the Convention, in order to give "substance" to the provision regarding passenger tickets.

Ironically, a dissenting view in *Lisi* may have been a premonition of the developments to come. Noting that "[t]he majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it," *Li* ". *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting), *aff'd by equally divided court*, 390 U.S. 455 (1968), the dissent termed the court's action in what was a turning point in the law "judicial treatymaking." *Id.* Further, Judge Moore noted that "[w]ere actual notice to be the requirement, every airline would have to have its agents explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both

understood and agreed to the limitation." *Id.* While it may be overstated, the hypothetical does drive home the point that preoccupation with the type size has less to do with "adequate notice" than with rejection of the limitation.

Although Article 3(1)(e) specifies that a passenger ticket shall contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention," Article 3(2) says nothing regarding the "adequacy" of notice or any other particulars of the required statement. A literal reading of the provision would seem to indicate that the Convention is intended to apply regardless of whether or not the physical ticket is retained once it has been delivered into the possession of the passenger; certainly, there is no requirement that it be read by the passenger. Also, defects in the physical ticket are not to interfere with the enforceability of the liability rules. Indeed, inadequate notice through the statement could be considered an "irregularity" or defect in the pasenger ticket which "shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention."

Nevertheless, in *Mertens v. Flying Tiger Line, Inc.*, the Second Circuit found that physical delivery of a ticket once the passenger has boarded the airplane is inadequate and constitutes "nondelivery" under Article 3(2). The court stated: "We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. . . . The delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air." 341 F.2d at 856-57. However, the situation presented to the *Mertens* court involved *physical* delivery of the passenger ticket. While it is not surprising that an American court would find it necessary that

notice, once required, be given "in such a manner as to afford [the passenger] a reasonable opportunity to take self-protective measures," a notice requirement is nowhere within the treaty nor is the Article 3(1)(e) statement linked with the limitation.

The definition of "adequate notice" found in *Mertens* was dependent upon the timing of the physical delivery of the ticket. The court found that the ticket containing notice must be delivered in circumstances allowing the passenger to obtain additional protection, if desired. Given that the *Mertens* court had decided that the limitation was such an alarming prospect for any passenger to face, it is not surprising that the standard for permitting the limitation to stand and for protecting the passenger against the limitation became strict notice of the limitation.

In *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965), the court followed the reasoning in *Mertens* and held that the very inclusion of a requirement to provide a statement of the applicability of the Convention's limitation meant that "[t]he purpose of such a statement is to notify passengers of the applicability of the Convention, thus affording them an opportunity to take steps to protect against the limitation of liability." 352 F.2d at 497. The Ninth Circuit expanded the *Mertens* holding, stating that there is an "implied requirement of Article 3(2), that delivery of the passenger ticket be made sufficiently in advance of the flight so that the passenger may, if he desires, obtain additional insurance protection." 352 F.2d at 498.

Occurring before the Montreal Agreement became effective, and indeed, before the United States threatened denunciation of the Warsaw Convention, these cases did not rely on the nature or size of the print found on the passenger ticket. Nonetheless, the courts managed to sidestep the limitation and provide what is already proper under domestic law: full recovery to injured plaintiffs.

Then, almost immediately following these cases, again before the Montreal Agreement, focus began to be placed on the "adequacy of notice" as related to the print of the ticket. A landmark case, *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by equally divided court*, 390 U.S. 455 (1968), held that "compliance with the Convention requires not mere physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable." 253 F. Supp. at 239 (footnote omitted). Having phrased the question with respect to Article 3(2) as one of "adequate notice," the lower court in *Lisi* went on to find that the notice of the applicability of the liability limitations was in fact inadequate because it was printed in "microscopic type," "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract.'" 253 F. Supp. at 243. Further, the court found that the required statement was "ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed." *Id.* In effect, then, the court found that even with advance physical delivery, without a properly legible statement of the limitation, there could be no delivery of the ticket. In this way, the court rewrote that provision in the Convention which states that failure to include the statement of limitation on liability *does* not affect the applicability of the Convention's rules. While the *Lisi* court may well have construed the diminutive statement as equivalent to no statement at all, it seems at least somewhat extreme to have equated this fact to non-delivery of the entire contract of carriage. Article 3(2) appears directed to the *entire* ticket, which is evidence that a contract has been formed, and appears much less concerned with notice of limitation on liability than American courts have imputed to the drafters of the treaty.

On appeal, the Second Circuit noted:

> The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

370 F.2d at 512-13 (footnote omitted). Again, the court was concerned with giving the Convention meaning; this meant giving the passenger "notice" of the position he was placing himself in by traveling internationally by air. Moreover, it has generally been agreed that the *quid pro quo* for the limitation is, not notice, but liability without fault. Even at the Hague Conference, liability as determined under the "wilful misconduct" provision was linked to the attempts to raise the limitation. Lowenfeld & Mendelsohn at 505. There is no evidence that the treaty drafters and signatories intended "adequate notice" to affect the operation of the treaty limitation.

There is in fact evidence to the contrary. In *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (C . 1979), *rev'g* 53 D.L.R.3d 636 (Que. C.A. 1974), *aff'g in part and rev'g in part*, 12 Av. Cas. (CCH) 17,191 (Que. Super. Ct. 1971), the reasoning which was developed in *Mertens*, *Warren* and *Lisi* was considered and rejected. In *Ludecke*, the Supreme Court of Canada found:

> [T]he words of art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above which hold that delivery of a ticket with an irregularity, that is, a statement as required by art. 1(*e*) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test.

98 D.L.R.3d at 57.

Given the history of discontent with the limitation, it seems that the decisions rendered in these cases were directed toward correcting what is admittedly an inequitable burden as presently borne between carriers and passengers. Instead of giving weight to the history of the Warsaw/Montreal system, the courts have managed to interpret an additional waiver provision into the treaty.

Following the acceptance of the Montreal Agreement and the United States withdrawal of its Notice of Denunciation, the courts have continued to view with disapproval the limitation on air carrier liability. Judicial circumvention of the treaty limitation has taken a slightly different direction upon United States acceptance of the Montreal Agreement. Instead of focusing upon the timing of physical delivery, as in *Warren* and *Mertens*, the *Lisi* concern with the statement, which is never referred to as "notice" in the Convention itself, and the size of the print, increasingly became the focal point for attack.

2. 10-point type size requirement

As early as 1963, before the Montreal Agreement, the Civil Aeronautics Board promulgated regulations for air carriers which required the statement of applicability of the limitation to be printed in at least 10-point modern type size on paper of contrasting color. *See* 14 C.F.R. § 221.175(a). In *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973), this Circuit Court of Appeals rejected the petitioning air car-

rier's argument that promulgation of the C.A.B. regulation conflicted with the Warsaw Convention and exceeded the agency's authority. The Circuit Court first found that the terms of Article 3 do not preclude the addition of more specific requirements regarding the statement. Further, the Court found that "[t]he recent trend of appellate court decisions has been to accord substance to the protections that Article 3 of the Convention intended to provide airline passengers." 479 F.2d at 917. The Court continued to find that "[t]he passenger is to receive full and effective notice of any limitations of liability so that alternative protection may be obtained." *Id.* The *Deutsche Lufthansa* case first determined that the C.A.B. regulations are valid and do not contravene the purposes of the treaty; in making this finding the Circuit also accepted the *Lisi* holding that "unless adequate notice is accorded its passengers, the carrier will later be precluded from using the Convention to limit liability." *Id.* at 918. In dicta surrounding the challenge to the domestic regulation, this Circuit noted that compliance with the regulation will not only provide passengers with adequate notice of the limitations on liability imposed on them but will later enable the carrier to invoke the protection of Article 3(1)(e); however this Circuit did not and has not yet addressed the question of what constitutes "adequate notice."

Having gone beyond the question of whether notice required by the treaty, the question of just what constitutes "adequate notice" was addressed by the Second Circuit in *In re Air Crash Disaster of Warsaw, Poland on March 14, 1980*, 705 F.2d 85 (2d Cir. 1983). Essentially, the Court accepted the premise that the statement *must* provide notice of the limitation in order for the limitation to apply. From this premise, the Court progressed to a determination of "adequate notice." The Second Circuit decided that the "bright line" for "adequacy of notice" should be drawn at the 10-point type requirement found in both the C.A.B. regulation and the

Montreal Agreement. Thus, the 10-point type requirement has been grafted onto the treaty as the next phase in the attempt to circumvent the treaty provision. *In re Air Crash Disaster at Warsaw, Poland, supra*, went so far as to construe the "special contract" that was the Montreal Agreement as part and parcel of the treaty, and indeed, to place that new, "modified" provision just where the courts wanted it to be.

Construing the Article in this way is intended to give it a meaning parallel to that found in American law, but does not accord the treaty provision the meaning evident from the negotiation and debate which led to its promulgation. Nothing in the Montreal Agreement requires that an air carrier provide the statement of liability limitation in 10-point type or lose the benefit of that limitation. Nothing in the debate or dissatisfaction with the limitation which led to the Montreal Agreement confirms the contention that "adequate notice" was an issue. At the core of the debate is dissatisfaction with the very existence of the limitation; the erosion of the circumstances in which carriers may avail themselves of that limitation is the result of judicial frustration at the fact that courts are prevented from fully compensating plaintiffs, especially victims of air tragedies such as presented in this case. This disturbing feature of the treaty has not been eradicated through political process.

While American courts may be justifiably frustrated with the anachronism which the treaty limitation has become, it is not within the province of the judiciary to alter the *quid pro quo* agreed to by the political branches. It has been generally understood that in exchange for virtual strict liability against air carriers, international passengers are limited in their recovery. The "special contract" known as the Montreal Agreement supplemented the *quid pro quo* by raising the amount of the limitation and waiving the carriers' defenses under Article 20 leaving only the presumption of liability. It also

supplemented the Article 3 requirements that a statement be included in the passenger ticket by providing specifics to be provided by carriers stopping in the United States; it did not alter the *quid pro quo* by linking Articles 22 and 20 with Article 3.

In any case, the political branches are vested with the power and authority to make express their intent regarding the enforceability of the treaty limitations in cases where the C.A.B. regulation and Montreal Agreement directive for 10-point type has been violated. However, the United States must be explicit if it is its intent to abrogate the obligation to enforce the treaty limitation in cases such as these Plaintiffs present. The Court notes that were the violation of the regulation for 10-point type and the carrier agreement indeed crucial, a more appropriate sanction would be to prohibit the recalcitrant carriers from engaging in air transportation to or from the United States. While the Government does not have the unilateral power or authority to be rid of the treaty limitation altogether (even the earlier threat of denunciation by the largest participant in international aviation could not accomplish this) the Government could suspend the operating permits of those carriers who do not abide by our domestic laws and regulations. 49 U.S.C. § 1372. The 10-point type size regulation is such a domestic requirement. While the carrie agreed to it in the Montreal Agreement as well, the foreign air carriers are *not* the contracting parties to the treaty. Therefore, Plaintiffs' argument that this carrier was on notice that it would be stripped of limited liability for failing to provide "adequate notice" must fail. While it is indeed correct that the Montreal Agreement must be read in connection with the Warsaw Convention, the resulting Warsaw/Montreal system does not include delimiting liability for failure to provide the statement in 10-point type size. In short, the Montreal Agreement may not be read wholesale into the Warsaw Convention.

Although Plaintiffs derive their argument linking the treaty sanction to the statement from case precedent, the basic flaw in their argument is the assumption that the Montreal Agreement can operate as an amendment to the Warsaw Convention; it cannot. Under the Convention's provisions, the carrier and the passenger may agree to a higher limit of liability. While the limit may be raised, nothing in the "special contract" provision allows it to be completely removed. There is nothing in the "special contract" provision which allows the carrier to waive its defenses under Article 20. However, an express, written agreement to waive those defenses, which the Montreal Agreement contains, should be honored by the courts. Waiver by express agreement is not claimed by these Plaintiffs. Defendant Korean Air Lines, having agreed to the Montreal Agreement, has come forward to make an express denial of waiver in these circumstances. Were the Court faced with a clear, political decision to avoid the treaty limitation where there has not been "adequate notice," however defined, or were it faced with an express waiver, as with the Article 20 defenses, then a different decision would be possible.

Putting aside for the moment the question of whether the Montreal Agreement may amend the treaty, the principal concern in adopting the Agreement was the United States' threat to withdraw from the Convention; notice of the limitation's operation was *not* an issue. Where the political branches have been stymied, "judicial treatymaking" to include notice has proved irresistible to some courts. In the view of this Court, treaty revision is not the right or responsibility of the judicial branch. Moreover, the Executive Branch has recognized the continued vitality of the Warsaw Convention. In its *amicus curiae* brief in the *Franklin Mint* case, the United States cautioned against rendering the treaty limitation entirely unenforceable. While not addressing the exact question which faces this Court, the Government brief noted that "The United States remains committed to the

Convention as the basic instrument governing questions of liability in the international aviation industry." *Amicus Curiae* Brief of the United States at 2. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). As the Supreme Court noted in its decision in the case, "when the parties to a treaty continue to assert its vitality a private person who finds the continued existence of the treaty inconvenient may not invoke the doctrine on their behalf." *Id.* at 253. Since the branches of Government vested by the Constitution with the power to make and break treaty obligations continue to assert th utility of the Convention, and to assert the enforceability of the treaty limitation, these private citizens may not, indeed the Court may not, define the treaty limitation out of existence, even in narrow circumstances. That task, difficult though it has proven to be, has been assigned to the legislative and executive branches of our Government.

3. Immediate payment of $75,000

In addition to seeking unlimited liability against Korean Air Lines, Plaintiffs have requested an immediate payment of $75,000 as partial damages. Plaintiffs misconceive the nature of the limitation. The $75,000 limitation on air carrier liability is a maximum, not a minimum, on the amount of damages which a plaintiff may receive, *once he has proven his damages.* While the Montreal Agreement subjects air carriers to virtual strict liability, air carriers are not automatically liable for an amount of $75,000. The limitation does not operate as would insurance; Plaintiffs are still required to prove the amount of their damages and are entitled to receive only the amount which they can prove.

Moreover, the nature and amount of unliquidated damages cannot be proved in a motion for summary judgment. Since the amount of damages must be established on an individual basis, there are still material issues of

fact which remain to be tried. Defendant cannot be precluded from conducting discovery with which to defend against Plaintiffs' claims. There being material issues of fact with respect to the amount of individual damages, it would be entirely inappropriate to award the maximum damages. The request for immediate payment of $75,000 must be denied.

CONCLUSION

"Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice." *Lisi v. Alitalia-Linee Aeree Italiane*, S.p.A., 370 F.2d at 515 (Moore, J., dissenting). The Montreal Agreement is not a negotiated amendment to the Warsaw Convention. Even if the Agreement could rise to the level of an amendment to the treaty, which it cannot, the principle of law requiring clear expression of the intent of the political branches would prevent a finding that the treaty is to be abrogated. Plaintiffs' construction is not supported by the negotiating history of the Warsaw/Montreal system.

It may be arguable that American courts have been justified in arriving at the conclusion that the Montreal Agreement affects the application of the treaty sanction since the Agreement applies only to transportation including the United States; however, such an interpretation rejects the fact of the clear intransigence of a majority of High Contracting Parties to the Convention with regard to delimiting carrier liability. There is every indication that the majority of the more than 120 nations adhering to the Convention intend to continue the special protection afforded international carriers, even at the expense of international passengers. In light of this intransigence, it is especially inappropriate for the Court to

interpret the treaty provisions in such a way as to relieve the United States of its treaty obligations. In addition, the Montreal Agreement contains no expression of the carriers' intent to waive the limitation. In fact, it makes no mention at all of the sanction to be imposed for a carrier's failure to include proper notice to passengers. Making tolerable an intolerable treaty provision is simply not the province of the courts. Therefore, for the foregoing reasons, the motion for partial summary judgment against Korean Air Lines shall be DENIED.

An appropriate Order accompanies this Memorandum.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

DATE: July 25, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Civil Action Nos. 83-2793,
83-2941, 83-3154, 83-3177,
83-3204, 83-3441, 83-3445,
83-3448, 83-3449, 83-3450,
83-3451, 83-3452, 83-3453,
83-3454, 83-3455, 83-3456,
83-3457, 83-3458, 83-3459,
83-3460, 83-3461, 83-3462,
83-3463, 83-3464, 83-3465,
83-3466, 83-3467, 83-3468,
83-3469, 83-3470, 83-3473,
83-3474, 83-3587, 83-3588,
83-3792, 83-3793, 83-3889,
83-3891, 83-3898, 83-3901,
83-3902, 83-3903; 84-0029,
84-0030, 84-0402

ORDER

In accordance with the Memorandum entered this date, it is by the Court this 25th day of July, 1985,

ORDERED, that Plaintiffs' Motion for Partial Summary Judgment Against Defendant Korean Air Lines Co., Ltd. is DENIED; and it is

FURTHER ORDERED, that Korean Air Lines Co., Ltd., is entitled to avail itself of the limitation on dam-

ages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and it is

FURTHER ORDERED, that Plaintiffs may not receive immediate payment of $75,000, there being material issues of fact with respect to the amount of unliquidated damages.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

D.H. GINSBURG, *Circuit Judge, concurring*: I join in the court's opinion and add some reflections on the "choice of law" problem in the context of a federal claim transferred under 28 U.S.C. § 1407 from courts in various circuits to a court in another circuit. I write separately to emphasize the practical problems inherent in any resolution of this problem under the statute as written, and to surface preliminarily some ameliorative steps open only to Congress.

I. CONGRESSIONAL INTENT IN SECTION 1407(a)

The problem is simply enough stated. The Second Circuit takes one view of the relevant federal law, this court takes another, and still other circuits have not addressed the question. Cases filed in district courts in the Second Circuit, in this circuit, and in other circuits were consolidated in the district court here for pretrial proceedings under § 1407. On a motion for summary judgment as to all the cases, which view of the applicable federal law is the district court to apply to the cases filed outside this circuit? The New York plaintiffs in this case contend that, under *Van Dusen v. Barrack*,[1] the transferee district court must apply the Second Circuit's interpretation to the cases filed originally in that venue. The court rejects that argument because the *Erie* policies underlying *Van Dusen* do not extend beyond the sta law context of that case.[2] I agree.

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[1] 376 U.S. 612 (1964).

[2] Opinion of the Court, *supra*, at 7. Plaintiffs cite several authorities for the proposition that *Van Dusen* requires a transferee court under section 1407 to apply the case law of the transferor circuit to a transferred case. Plaintiffs' Brief at 7. *See Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 408 n.7 (2d Cir. 1975) ("Since this case was brought in a district court in the Fifth Circuit, the substantive law of that circuit is the law we must consider here."); *In re National Student Marketing Litigation*, 517 F.Supp. 1345, 1346 n.3 (D.D.C. 1981); *In re Haven Industries*, 462 F.2d 172, 179

Quite apart from whether *Van Dusen* is controlling, there are some circumstances in which a federal court is bound to apply the decisions of another circuit, but

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(S.D.N.Y. 1978); *Stirling v. Chemical Bank*, 382 F.Supp. 1146, 1150 n.5 (S.D.N.Y. 1974), *aff'd* 516 F.2d 1396 (2d Cir. 1975); *In re Four Seasons Securities Laws Litigation*, 370 F.Supp. 219, 228 (W.D.Okl. 1974); *In re Plumbing Fixtures Litigation*, 342 F.Supp. 756, 758 (Jud.Pan.Mult.Lit. 1972); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1053, 1055 (E.D.Pa. 1969).

The cursory "analysis" employed in the cases amounts to the following. In *Philadelphia Housing Authority*, the parties did not dispute the proposition, and the court cited *Van Dusen* as authority. The issue was disputed in *Plumbing Fixtures*, but the court relied upon *Van Dusen* and *Philadelphia Housing Authority* without analysis. *National Student Marketing*, *Four Seasons*, and *Stirling v. Chemical Bank* merely bootstrapped on *Plumbing Fixtures*, while *Haven Industries* cited *Plumbing Fixtures* as well as the Second Circuit's decision in *Berry Petroleum* (the only court of appeals decision favorable to the New York plaintiffs) which itself cited both *Plumbing Fixtures* and *Van Dusen* without discussion. That these cases fail to acknowledge the differences between the application of state and federal law was also pointed out *In re Pittsburgh & L.E.R. Co. Securities & Antitrust Litigation*, 543 F.2d 1058, 1065 n.19 (3rd Cir. 1976), which particularly undermines the value of *Philadelphia Housing Authority* as precedent on this point. *Berry Petroleum* is also questionable because it fails to address two prior decisions of the Second Circuit that are in direct conflict with it. *See H.L. Green Co. v. MacMahon*, 312 F.2d 650 (1962), *cert. denied*, 372 U.S. 928 (1963); *Ackert v. Bryan*, 299 F.2d 65, 69-70 (1962); *see also Clayton v. Warlick*, 232 F.2d 699, 706 (4th Cir. 1956); *Scheinbart v. Certain-Teed Products Corp.*, 367 F.Supp. 707 (S.D.N.Y. 1973).

Two other cited cases, *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973*, 399 F.Supp. 1106, 1108 (D. Mass. 1975); *In re Air Crash Disaster Near Hanover, New Hampshire*, 314 F.Supp. 62, 63 (Jud.Pan.Mult.Lit. 1970), are inapposite here; like *Van Dusen*, they involved the issue of which *state* law to apply. *See also In re Nucorp Energy Securities Litigation*, 772 F.2d 1486, 1491-92 (9th Cir. 1985);

they are the rare instances where a preclusion doctrine so requires. The doctrines of *res judicata*, collateral estoppel, and law of the case come to mind. The New York plaintiffs do not, and cannot, however, rely upon any of these doctrines to support application of *Polish Airlines* to their transferred cases.

Consequently, the New York plaintiffs' suggestion that transfer under section 1407(a) presents the type of exceptional circumstance that justifies imposing upon a federal court the duty to accept as binding another circuit's interpretation of federal law would constitute novel departure from the norm of independent judgment. If Congress had intended such a departure, therefore, we should expect to find language in section 1407(a) that mandates, or at least suggests, it. Obviously, Congress could have directed transferee courts to apply the case law of the transferor court. Less directly, Congress could have suggested this practice by transforming the transferee judge into a temporary judge of each transferor court for the purposes of deciding the transferred cases.[8]

In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983, 629 F.Supp. 307, 315-16 (S.D.Fla. 1986). Judge Weigel cited the federal and state law cases together as supporting the proposition that "the transferee court must apply the substantive law of the transferor forum." Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 584 (1978). *See also* Manual for Complex Litigation, Second § 31.122 at 254 n.25 (1985) ("The transferee judge is bound . . . by the law that would apply in the transferor court, even if the case is later transferred to the transferee court under 28 U.S.C. § 1404").

[8] Congress took this type of approach in Section 1407(b) in apparent recognition that transferee judges, because they often preside over cases from far-flung transferor courts, would of necessity have to perform in unfamiliar roles. In section 1407(b), Congress authorized transferee judges to

We find no such language in section 1407(a), however.[4] Instead, the transfer scheme contemplates that a transferee court will adjudicate transferred cases no differently than cases originally filed before it. This is apparent throughout the scheme, from the point of transfer to the final disposition of the case. Rather than confine the transferee judge merely to presiding over the pretrial phase of cases that may be resolved finally in the transferor courts, section 1407(a) transfers jurisdiction over whole cases to the transferee court; upon transfer, the transferor courts retain no jurisdiction whatsoever.[5]

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order pretrial depositions outside of their normal jurisdiction. As we determined *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 880-881 (D.C. Cir. 1981), however, it did so by making the transferee judge, for that purpose, a "temporary judge" of the district court for the district in which the deposition is taken. Congress seemingly could have drafted section 1407(a) also to transform the transferee judge into a judge of each transferor court for purposes of deciding the cases transferred from that court. (Such an approach would still preserve the efficiencies of requiring only one federal judge to become versed in the facts of a controversy.) If Congress also provided for transferor circuit review of such cases, then we might conclude that Congress' intent under such a version of section 1407(a) was for the case law of the transferor court to govern the transferred case.

[4] Section 1407(a) was enacted in 1968, and its legislative history indicates that *Van Dusen*, decided four years earlier, would apply in the pretrial context. *See* Opinion for the Court, *supra*, at n.5. There is no indication, however, that Congress believed that *Van Dusen* extended beyond its own context of federal courts applying state law.

[5] *See Glasstech, Inc. v. AB Kyro OY*, 769 F.2d 1574 (Fed. Cir. 1985); *Astarte Shipping v. Allied Steel & Export Service*, 767 F.2d 86, 87 (5th Cir. 1985); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, 118 (6th Cir. 1981); *General Elec. Co. v. Byrne*, 611 F.2d 670, 673 (7th Cir. 1979); *In re FMC Corp. Patent Litigation*, 422 F.Supp. 1163, 1165 (Jud.Pa.Mult.Lit. 1976). *Cf. Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc) (transfer under section 1404(a)).

Indeed, Congress contemplated that transferred cases might never return to the transferor courts, but instead might be settled or resolved by summary judgment in the transferee court,[6] or else transferred under section 1404(a) to that same transferee court for joint trial.[7] In practice, the vast majority of transferred cases are so resolved, and do not return to the transferor courts.[8] Finally, during the period of the 1407(a) transfer, any appeals—interlocutory or after summary judgment—go to the court of appeals for the transferee court, not to the courts of appeals for the transferor circuits.[9] I c:

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[6] *See* Weigel, *supra* note 2, 78 F.R.D. at 582-83; *Pfizer Inc. v. International Rectifier Inc.*, 538 F.2d 180 (8th Cir.), *cert. denied*, 429 U.S. 1040 (1976); *Humphreys v. Tann*, 487 F.2d 666, 668 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom. Standard Oil Co. v. Alaska*, 415 U.S. 919 (1974); *Reidinger v. Trans World Airlines, Inc.*, 463 F.2d 1017, 1018 n.2 (6th Cir. 1972).

[7] *See, e.g., In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 479 F.Supp. 1118, 1121-22 (E.D.N.Y. 1978), and cases cited; *In re Yarn Processing Patent Validity Litigation*, 472 F.Supp. 174 (S.D.Fla. 1979); *In re Antibiotic Actions*, 333 F.Supp. 299 (S.D.N.Y. 1971).

[8] *See* Weigel, *supra* note 2, 78 F.R.D. at 583, which reports that less than 5 percent of transferred cases return to transferor courts. More recent statistics indicate that t... number may now approximate 25 percent. *See* 1986 Ann.Rep. Director Admin.Off. U.S. Courts 128; Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U.Pa.L.Rev. 595, 700 (1987).

[9] *See Corrugated Container*, 662 F.2d at 88; *Glasstech, Inc. v. AB Kyro OY*, 769 F.2d at 1576-78; *Astarte Shipping v. Allied Steel & Export Service*, 767 F.2d at 87. In a number of other decisions, *see, e.g., Gulf Oil Co. v. Copp Paving Co.*, 419 U.S. 186 (1974), as well as the cases cited *supra* note 6, the authority of the transferee circuit to review a transferee district court's order was assumed *sub silentio*.

see no indication, from the outline of this scheme, that Congress intended for transferee courts to apply to each transferred case the case law of the transferor court, nor any reason why it would so intend.

Before concluding, based on the lack of any evidence to the contrary, that Congress did not intend transferee federal courts to depart from the norm of independent judgment on matters of federal law, one final inquiry is necessary. For we should still hesitate to adhere to that norm if doing so would, for some other reason, frustrate the purpose of section 1407(a) "to promote the just and efficient conduct" of multidistrict actions, and part by "eliminat[ing] the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts." [10]

In order to discern whether the norm of independent judgment would have this result, we may assess its operation in the instant case. To recapitulate the procedural facts a bit, cases from district courts in the First, Second, and Sixth Circuits were transferred to the District Court for the District of Columbia for pretrial proceedings to be conducted jointly with cases filed here. KAL then filed a motion for summary judgment on the issue of damages, arguing that the Warsaw Convention imposed a maximum no-fault liability of $75,000 per passenger. When the motion was filed, only the Second Circuit had spoken on the pertinent question, holding in *Polish Airlines* [11] that an airline that does not give passengers tickets with 10-point type loses the protection

[10] *In re Plumbing Fixtures Cases*, 298 F.Supp. 484, 491-92 (Jud.Pan.Mult.Lit. 1968).

[11] *In re Air Crash Disaster at Warsaw Poland*, 705 F.2d 85 (2d Cir.), *cert. denied sub nom. Polskie Linie Lotnicze v. Robles*, 464 U.S. 845, *reh. denied*, 464 U.S. 978 (1983), *subsequent proceedings*, 748 F.2d 94 (2d Cir. 1984), on appeal after remand, *Harris v. Polskie Linie Lotnicze*, No. 86-2323 slip op. (9th Cir. June 22, 1987).

of the damage ceiling. The other circuits, in particular the District of Columbia, First, and Sixth Circuits, had not yet addressed the issue.[12] Analyzing the Convention for himself, Chief Judge Robinson concluded that *Polish Airlines* was wrongly decided: noncompliance with the "10-point type" rule does not remove the ceiling.

Adhering to the norm of independent judgment, Chief Judge Robinson also determined that his ruling should apply to all of the cases before him, not only to those originally filed here. At least in the first instance, such uniform application of his ruling furthers considerably the efficiency and consistency goals of section 1407(a). All the cases will be governed by one rule as to damages, and they will all proceed in a like direction, rather than being bifurcated into two groups of cases with diverging litigation paths.

The only problem that does seem potentially to arise from this approach involves the eventual appellate review of Chief Judge Robinson's ruling on the Convention. Assuming for the purposes of illustration that interlocutory appeal to this court had not been granted and, furthermore, that the cases would not subsequently terminate for one or another reason in this circuit, then the transferred cases would return to the respective transferor courts for trial. The several courts of appeals, either on interlocutory appeal or on appeal of the final judgment, would in all probability review the course of pretrial proceedings, including Chief Judge Robinson's potentially outcome-determinative ruling on the Conven-

[12] Subsequent to the district court's grant of summary judgment in this case, the Fifth Circuit adopted the *Polish Airlines* rule. *See In re Air Crash Near New Orleans, Louisiana*, 789 F.2d 1092, 1098, *vacated*, 795 F.2d 381 (1986), *aff'd in relevant part*, 821 F.2d 1147 (1987) (*en banc*). As the district court's opinion in this case was not then published, however, the Fifth Circuit discussed only the Second Circuit's decision.

tion. Reversal would be most likely to occur, of course, in the Second Circuit, where his ruling would conflict directly with *Polish Airlines*.

Since this court would still review the cases filed in the District of Columbia, and as confirmed by the court today we do not agree with the *Polish Airlines* decision, the results on appeal would lead to two (or depending upon the views of the First and Sixth Circuits, perhaps more) different holdings on a determinative issue of damages.[13] A series of inconsistent appellate judgments is not a desirable outcome, however, particularly since the result in some cases might be to require renewed pretrial or trial proceedings. This whole course of case development, starting with divergent paths of appeal and ending with either conflicting or duplicative results, would clearly frustrate the primary goals of section 1407 (a) "to promote the just and efficient conduct" of multidistrict actions.

Having a transferee court apply the norm of independent judgment in ruling on transferred cases, therefore, does pose some risk of undermining on appeal the interests served by section 1407(a). The question is therefore whether this potential risk is great enough to frustrate Congress' remedial intent in enacting section 1407(a), and thereby to persuade us that transferee courts must abandon the norm of independent judgment in deciding transferred cases. In this regard, I believe that, although there is some risk of cases unraveling upon review by transferor circuits, it is not significant. First, relatively few cases ever return to the transferor courts.[14] Second, most transferee court rulings will not be outcome-determinative, but instead will involve routine matters, such as discovery orders, that will not provide grounds for a transferor circuit court to reverse a pretrial ruling by the transferee district court.

[13] In other situations, the disputed issue may involve liability.

[14] *See supra* note 8. Of course, fewer cases would be settled and more would return to their transferor courts if the other circuits show themselves ready to reverse transferee courts' pretrial rulings, thus inviting such encore appearances.

Third, as to those few outcome-determinative rulings of the transferee district court, there exists the possibility of interlocutory appeal to the transferee court, pursuant to 28 U.S.C. 1292(b), as indeed occurred in this case. If the transferee circuit reviews such a ruling, it of course would also exercise independent judgment and apply its own precedents rather than those of the transferor circuits. By reviewing the ruling, the transferee circuit probably will have insured that, if the cases are retransfered to the transferor courts, they will not unravel on later appeal. That is because, in contrast to the rulings of the district court under review, the interlocutory decisions of a coordinate court of appeals are likely to be accepted as binding, under the doctrine of law of the case, in the courts of appeals reviewing the final decision of the district court.[15] I therefore believe

[15] No decision of this court has directly resolved the question of how courts should apply the law of the case doctrine after a case is transferred back to a transferor court. *See Int'l Union, UAW v. Donovan*, 756 F.2d 162, 165 n.16 (D.C. Cir. 1985); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1082-83 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985); *McCandless v. Beech Aircraft Co.*, 697 F.2d 1156 (D.C. Cir. 1983). Our precedents do suggest, however, that the transferor circuit should not disturb the transferee circuit ruling. In *Laffey*, we held that the law of the case doctrine precludes—absent clear error or manifest injustice—our reviewing, on appeal from a final judgment, a previous ruling of this court rendered on interlocutory appeal. The next question is whether the fact of transfer, and the resulting lack of identity of the two appellate courts, would alter our conclusion that an interlocutory appellate ruling is law of the case for the purpose of a subsequent appeal. *Donovan* would seem to reject this possibility by holding that, in the context of a transfer for lack of jurisdiction, the transferee court should not reexamine

that if (1) transferee circuits are receptive to interlocutory appeals involving outcome-determinative rulings by a transferee district court—again, as occurred in this

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the ruling of a transferor court of *coordinate* jurisdiction absent exceptional circumstances. In fact, this principle has been stated by other circuits. *See Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir.), *cert. denied*, 106 S.Ct. 230 (1985); *Central Soya Co., Inc. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169 (3rd Cir. 1982); *Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 558 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976). *See also Sentner v. Amtrak*, 540 F.Supp. 557, 558-59 n.3 (D.N.J. 1982); Steinman, *supra note* 73, 135 U.Pa.L.Rev. at 702-03 & n.417; Weigel, *supra* note 5, 78 F.R.D. at 577.

While a transferor court of appeals might disagree with the transferee circuit's reading of the law, there is good reason in this context to accept a reasoned opinion as presenting something less than the clear error or exceptional circumstance that warrant departing from the law of the case doctrine. Chief Judge Robinson well put the case for transferor courts giving preclusive effect to rulings of a transferee court: "if transferor courts were free to readjudicate issues determined by transferee courts, transfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication they were designed to eliminate." *In re Korean Air Lines Disaster of September 1, 1983*, MDL 565, Civ. No. 83-0345, Order on Remand at 5 (May 7, 1987).

See also In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C. Cir. 1981) ("Proper coordination of complex litigation may be frustrated if other courts do not follow the lead of the transferee court."). *Multi-Piece Rim Products* did not directly address the situation discussed in the text. Instead, it involved whether a pre-transfer order of a transferor district court had preclusive effect, as law of the case, on a transferee district court. *Cf. Blaski v. Hoffman*, 260 F.2d 317, 322 (7th Cir. 1958), *aff'd*, 363 U.S. 335 (1960) (the transferee Seventh Circuit refused to abide by the "erroneous" jurisdictional ruling of the transferor Fifth Circuit; the Supreme Court adopted the Seventh Circuit's view of the merits, but the law of the case issue was not raised to the court, although in *dictum* it suggested that, because the ruling involved the Seventh Circuit's jurisdiction, it would

case as well as in *Polish Airlines*[16]; and if (2) transferor circuits are receptive, on appeal after retransfer, to the law of the case as it was decided in the transferee circuit court, then even a continuing disagreement between the transferee and transferor circuits on the certified issue need not cause particular cases in a multidistrict litigation to come unglued.

As a result, any harm to the interests Congress meant to further in section 1407(a) will be limited to those outcome-determinative rulings of a transferee district court that are not the subject of an interlocutory appe in the transferee circuit, and, assuming that the cases are transferred back to the transferor courts, result in reversals by one or more transferor circuit courts.[17] Whether this harm, which seems likely to be insignificant, is nevertheless great enough that transferee district courts must abandon the norm of independent judgment,

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not be bound by the Fifth Circuit's ruling on that point, 363 U.S. at 340 & n.9); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, at 118-20 (6th Cir. 1981); *In re Long Distance Telecommunication Litigation*, 612 F.Supp. 892, 900-03 (E.D.Mich. 1985).

[16] *Polish Airlines*, 705 F.2d at 86 n.2 (a second interlocutory appeal followed—*see* 748 F.2d at 94-95). *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 192; *In re Western Liquid Asphalt Cases*, 487 F.2d at 192-93; *In re Air Disaster at John F. Kennedy International Airport*, 479 F.Supp. a 1124-29, and cases there cited.

[17] This harm would be further minimized if transferor circuit courts required, as a condition of reviewing a ruling by the transferee district court, that the appellant at least have sought interlocutory appellate review of that ruling while in the transferee circuit. This rule is comparable to that under which an appellate court will decline to reach an issue not raised before the trial court, *see District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984), and the institutional interests served are similar. In each instance, the rule requires the litigant to raise an issue at a particular stage in the litigation in order to prevent the litigant from, in

depends upon the probable effects of the alternative rule, under which the transferee district court would apply what it believes would be the interpretations of the respective transferor courts.[18] Again, the facts of this case are illustrative.

Under that alternative, Chief Judge Robinson, having determined that KAL's issuance of 8-point type tickets did not remove the limitation on damages provided under the Convention, would then have to determine the scope of his ruling. Certainly it would govern the cases filed in this district originally; no one disputes that proposition. Under the New York plaintiffs' argument, however, the ruling should not govern their cases, because *Polish Airlines* clearly dictates the contrary interpretation of the Convention.

When applied only to the District of Columbia and New York cases, adherence to the case law of the transferor circuit would be a fairly easy procedure for the transferee district court. It is almost a certainty, however, that the bifurcated ruling it produces would place the District of Columbia and New York cases on increas-

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effect, confronting the court on appeal with an issue that has not been sorted out by a court of first instance, thereby creating "'[e]normous confusion and interminable delay.'" *Id.* at 1084, *quoting Johnston v. Reily*, 160 F.2d 249, 250 (D.C. Cir. 1947). In the transfer context, this suggestion would deprive parties who lose before the transferee district court, and anticipate losing as well before the transferee circuit court, of the incentive to avoid interlocutory appeal and to forestall settlement in the hope of having the case retransferred to the circuit whose more favorable case law renders appellate success more likely.

[18] If transferor circuit law were applicable, the transferee district court might also remand the case to the respective transferor districts for resolution of an issue. Depending upon the issue and its disposition, retransfer (even after interlocutory appeal in the transferor circuit) might be in order. The cost and delay of proceeding in this manner undercuts, however, Congress' purpose in enacting section 1407.

ingly divergent courses. The District of Columbia plaintiffs, in conducting discovery, will have to pursue evidence of fault on the part of KAL, whereas the New York plaintiffs would be able to recover without such a showing. The entire course of discovery, and thus the motions that come before Chief Judge Robinson, would differ entirely between what would have become, in effect, two separate groups of consolidated cases. These differences would be further magnified by the vastly different incentives for settlement facing the two groups of plaintiffs. The District of Columbia plaintiffs, having to prove fault, will presumably be more amenable to settlement than would be the New York plaintiffs. All in all, therefore, it is unlikely that the bifurcated ruling would preserve, to any significant extent, either the efficiency or the consistency that section 1407(a) was intended to promote.

Under the New York plaintiffs' rule, therefore, the threat that the Second Circuit would reverse Chief Judge Robinson and thereby unravel the New York cases is averted, in effect, by preemptively unraveling them in the transferee court. This seems to be a high price to pay—a virtual abandonment of the efficiency and consistency goals of section 1407(a)—to protect against a threat, i.e. unraveling in the transferor circuit courts, that could instead be avoided, at no cost to consistency and at much lower cost in efficiency, through interlocutory appeal to the transferee circuit court and subsequent application by the transferor circuit of the law of the case doctrine.

The price that must be paid in abandoning the norm of independent judgment, however, looms even larger when one realizes that the New York plaintiffs have presented us with the deceptively easy alternative by applying *Polish Airlines* to the New York cases, without suggesting to us how the district judge should have ruled with respect to the cases from districts in the First and

Sixth Circuits, which have not decided this issue.[19] In attempting to rule as would a district court in those circuits, he could have simply applied his own ruling to those cases, happy to believe that, if called upon, those circuits would see things his way. Or, taking to heart the New York plaintiffs' contention that, under *Van Dusen*, transfer should result in merely "a change of courtrooms,"[20] he could have seriously attempted to divine how the First and Sixth Circuits might interpret the Convention if called upon to do so.

This enterprise is far more problematic than *Erie*'s familiar requirement that a federal court assume the perspective of the highest court in each transferor state, and anticipate how each one of those courts would decide an issue of state law. As to some *Erie* issues, the transferor states will have significantly different laws; as to others, such as those addressed by the sundry and not entirely "uniform" codes adopted by the several states, there may be only subtle differences, difficult to discern, among them. Regardless of the difficulty, however, the duty of the transferee court under *Van Dusen* and *Erie* is simply to arrive at what it, in good faith, believes to be an accurate statement of each state's law, as applied to the facts before it. When this results in the transferee court rendering different judgments in cases transferred

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[19] We see nothing in section 1407(a) that would justify a transferee court in applying transferor precedent when it is clear, as is *Polish Airlines* in the Second Circuit, but not trying to discern what other transferor circuits would decide when their case law is not as clear on the precise point in question but offers some guidance. Introducing such a distinction would constitute an act of legislation appropriate for Congress, not of interpretation of the existing statute by a court. Hence, either a transferee court must apply its own interpretation of federal law to all transferred cases, or it must attempt to apply what it believes to be each transferor court's probable interpretation. There is no middle road.

[20] 376 U.S. at 639.

from different fora, therefore, it is only because the states in question have exercised their undoubted "right to pursue local policies diverging from those of [their] neighbors."[21]

When we turn to questions involving federal law, the transferee judge's task becomes much more difficult, because here the court deals with a single federal law that can ultimately have only one proper interpretation. For example, in the instant case, a violation of the "10-point type" rule cannot both impose *and* not impose unlimited liability under the Warsaw Convention; eith the Second Circuit or we have interpreted it erroneously.[22] As a result, any attempt by Chief Judge Robinson to predict how the First and Sixth Circuits would interpret the Warsaw Convention on this precise point would necessitate casuistical musings concerning whether another circuit's case law might be read to compel, or even perhaps just to suggest, an interpretation in conflict with his.[23] Such intellectual practices fall within the domain of the sophist, not that of the judge.

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[21] *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941).

[22] Albeit not necessarily "clearly erroneous" for purposes of the law of the case doctrine. *See* note 15, *supra*.

[23] *See* Marcus, *Conflicts Among Circuits and Transfer Within the Federal Judicial System*, 93 Yale L.J. 677, 713-14 (1984). For the federal-law transfer situation to be analogous to what occurs under *Van Dusen*, in which the federal court assumes the perspective of the transferor state's highest court (i.e. of the supreme interpreter of the state's law), the question in the KAL case would *not* be (as the New York plaintiffs suggest it is)—"how would the other federal circuits interpret the Warsaw Convention?" Rather, the analogous question would be the same one that a circuit court normally poses when addressing an issue of federal law—"how would the U.S. Supreme Court (the supreme interpreter of federal law) interpret the Warsaw Convention?"

The practice suggested by the New York plaintiffs, therefore, differs qualitatively from accepted instances in which a federal court must apply the ruling of another court. Under the preclusion doctrines of res judicata, collateral estoppel, and the law of the case, a court applies a known ruling of another court—usually to the very facts from which it arose. Under the New York plaintiffs' suggestion, however, the transferee district court will often have to engage in pure guesswork in order to apply another circuit's precedents, if any there be, to the unique facts before it. In this respect, they propose a practice that is unprecedented in the context of federal courts interpreting federal law. Furthermore, when the transferee district court will not be able to rely on a decision on point, there is no assurance, try as it might, that it will always be able correctly to predict how an undecided transferor circuit will eventually decide the kind of close issue over which circuits tend to split. As a result, even though abandonment of the norm of independent judgment appears at first glance to provide a way to prevent cases from unraveling after returning to the transferor courts, the effectiveness of that course might be quite limited, in this case perhaps only to the New York cases.

I have undertaken to assess the implications of applying alternative interpretive models—the exercise of independent judgment versus the application of transferor court case law—in order to determine whether, although congressional silence would generally counsel us against doing so, we should nevertheless break with practice by having transferee courts apply transferor circuit case law. Such a break, as I indicated, would be justified only if the exercise of independent judgment would frustrate Congress' remedial purposes in enacting section 1407(a). The analysis of these alternatives, however, tends to confirm that we should adhere to existing practice. The purposes of section 1407(a) would more likely be frustrated,

not when a transferee district court exercises independent judgment, but rather when it attempts to anticipate the various transferor courts.[24]

Section 1407(a) was enacted "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts." [25] Under the New York plaintiffs' rule, however, transfer under section 1407(a) will simply yield "conflicting contemporaneous pretrial rulings" by one judge rather than by many. The transferee judge, on the most insignificant as well as outcome-determinative rulings, will have to wonder whether he or she would rule differently if located instead in one of the transferor circuits. No doubt, a considerable amount of the judge's time will be consumed attempting to determine whether litigants accurately describe differences in other circuits' interpretations of federal law. And, if the judge is persuaded that some difference does or *may* exist, it will be no small task to explain the inconsistent and contradictory rulings.

The conduct of multidistrict litigation, which is invariably time consuming as it is, will grind to a standstill while transferee judges read separate briefs, each based on the case law of a transferor circuit, on a single issue of federal law. Much of the advantage that transfer was intended to produce, and particularly the desiderata of furthering efficiency and preventing inconsistent ruling will be lost by requiring transferee judges to wear a number of judicial hats. It is the prospect of this kind of quagmire that is likely to yield the result feared by the Court in *Van Dusen*—that courts would be "reluctant to grant transfers" and thereby "frustrate the remedial

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[24] *A fortiori*, when it throws up its hands and remands the cases to the transferor courts for determination of the issue. *See* note 18, *supra*.

[25] *In re Plumbing Fixtures Cases*, 298 F.Supp. at 491-92.

purposes of [section 1407]." [26] It may well be preferable to have multidistrict litigation remain dispersed in the courts of origin than to have transferee judges burdened with the hopelessly complex task of sitting as several federal judges at once.[27] Consequently, even though having transferee judges exercise independent judgment may in isolated instances result in an unraveling of a transferred case, I believe that this approach, although not a perfect solution, is by far the less problematic and the more consistent with the intent of Congress in enacting section 1407.

II. Beyond Interpretation

Under section 1407(a), cases involving federal law are transferred from one circuit to another, and are conceivably subject to appellate review in several circuits, at various stages in the litigation. Given these facts, any resolution of the problem of whose case law will be applied entails, under the statute as currently written, some cost in efficiency and consistency; losses are truly unavoidable. They may be minimized, however, and that is why I reject the New York plaintiffs' suggestion, which in addition to exacting a much higher cost also requires federal courts, in the absence of any congressional mandate, to depart completely from the accepted norm of indepenednt circuit interpretation.

In order for cases to be transferred from one circuit to another with a minimum loss of efficiency and con-

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[26] *Van Dusen*, 376 U.S. at 636.

[27] This is particularly the case insofar as the rule applicable to transferee judges under section 1407(a) is applied as well in the analogous context of a transfer under section 1404(a). The prospect of a trial presided over by a judge expected to simulate different district courts throughout as many as twelve circuits is likely to discourage any court from ordering transfer under section 1404(a).

sistency, the only solution is for Congress to amend section 1407(a), as well as section 1404(a),[28] to provide that rulings by a court in one circuit will not be reviewed under the case law of another circuit. In this respect, the options seem to be: (1) adopt the New York plaintiffs' position, and have the law of the transferor court govern a transferred case throughout its disposition; (2) provide that a ruling in a transferred case is to be reviewed, by whatever circuit court, under the case law of the circuit in which the ruling was made; and (3) make transfer comprehensive, extending through trial and appeal in the transferee circuit (applying its transfer circuit precedents, of course). For the reasons I have given, the first option involves considerable costs. Because the transferee court will have to treat cases from different circuits differently, this alternative virtually guarantees the sacrifice of the efficiency and consistency gains that were supposed to result from conducting consolidated pretrial proceedings. Furthermore, it places the transferee district court in the almost impossible position of determining whether courts of appeals in other circuits would disagree in interpreting federal law.

The second option appears to be far more advantageous. Under this scheme, the transferee district court applies its circuit case law—which it knows best—and its own best judgment to all the transferred cases. By treating all the cases similarly, the statutory goals of efficiency and consistency would be immediately furthered. In addition, the risk that these goals would be undermined by a later unraveling of the cases in the transferor courts is substantially lessened. In reviewing a transferee district court's ruling, the transferor circuit courts would all apply the transferee circuit's case law, and in conducting this review they would be aided by the

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[28] *See* note 27, *supra*.

opinion of the transferee district court.[29] (The transferor circuit courts would thus be placed in a far more advantageous position than is the transferee district court under the New York plaintiffs' suggestion, which would often have to engage in pure guesswork, entirely without guidance about how a court in another circuit would rule.) Furthermore, transferor circuit courts are far less likely to reach conflicting conclusions if they all interpret transferee circuit case law than if they each exercise independent judgment. Consequently, unraveling is not likely to occur under this rule.

The second option is also more attractive because it involves a lesser departure from the norm of independent judgment. Whereas a transferee district judge must make frequent rulings, few cases ever return to the transferor courts and—unlike the first option—the second option would not create any greater incentive for a litigant to persist until the case is remanded. Moreover, in only a few of those that do return will the transferor circuit court have to review a ruling of the transferee district judge on an issue of federal law that will create disagreement among the circuits and thereby require the transferor circuit court, in applying transferee circuit case law, to issue a decision that does not reflect its own view.[30]

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[29] It may also be that the transferor circuit courts should afford some deference to the transferee district court's application of transferee circuit case law. *Cf. Bishop v. Wood*, 426 U.S. 341, 345-346 & n.10 (1976); *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 121 (D.C. Cir. 1986); *Hull v. Eaton*, No. 85-6024 slip. op. at 11-12 n.9 (D.C. Cir. August 4, 1987).

[30] In fact, the litigation that followed the Second Circuit's ruling in *Polish Airlines* illustrates this. As indicated above, *supra* note 16 and accompanying text, *Polish Airlines* was decided on interlocutory appeal from a ruling by the transferee district court. After pretrial proceedings were complete, the cases were remanded to the transferor courts for trial. On appeal from one of these trials, the Ninth Circuit held that calculation of damages was governed by the law of Poland, not that of California. *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987). Accordingly, the plaintiffs received $75,399.78 in damages, $10,000 less than they would have received under California law. Given this disposition, it is not surprising that the Ninth Circuit merely mentions the Second Circuit's holding in passing, *id.*, slip op. at 4, since the question of whether the Convention's $75,000 damage litigation applied had become all but irrelevant.

The third option entails all of the benefits of efficiency and consistency and none of the drawbacks of the second option. Insofar as transfer is burdensome for plaintiffs, however, it would tend to magnify their hardship, especially if they are to testify at trial. This detriment may be more or less offset by the reciprocal advantage accruing to a defendant that does not have to defend multiple trials at different places. A risk-averse defendant, on the other hand, might value the diversification of risk attendant to multiple trials, rather than having everything depend—even more than it already does as a result of the relaxation of the mutuality requirement for plaintiffs' use of estoppel—upon the fortuities of a single proceeding. As between the second and third options, therefore, considerable study would be needed in order to make an informed judgment, one that balances the goals of judicial economy and consistency against the distribution of costs imposed on plaintiffs and defendants in the course of realizing those goals.

III. Conclusion

As a court, however, we must address the statute as it is, not as it might be. Nothing in the Supreme Court's opinion in *Van Dusen* nor in the language of section 1407(a) requires a federal court to engage in the unprecedented practice of interpreting federal law through the analytical prism of another circuit's case law. The

New York plaintiffs have not shown, nor can I imagine, how the purposes underlying section 1407(a) would be furthered rather than frustrated by that approach. Under these circumstances, I can see no reason to condemn transferee district courts to perform often futile exercises in mental gymnastics.

Accordingly, I reject the New York plaintiffs' argument and join the court's opinion holding that our interpretation of the Warsaw Convention must be applied to all the cases before us.

Memorandum Opinion of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Nos. 83-0345, 83-3448, 83-3450, 83-3454, 83-3457, 83-3458, 83-3459, 83-3463, 83-3465, 83-3466, 83-3469, 83-3470, 83-3473, 83-3792, 83-3890, 83-3898, 83-3902, 83-3903, 83-0029

IN RE:

KOREAN AIR LINE DISASTER OF SEPTEMBER 1, 1983

MEMORANDUM

This matter comes before the Court pursuant to the January 30, 1987 remand of the Court of Appeals for the District of Columbia Circuit. The Court of Appeals, in considering an interlocutory appeal from this Court's denial of Plaintiffs' Motion for Partial Summary Judgment, was unable to determine the precise scope of this Court's Order. The problem centered around the question of whether the principles of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), required the Court to apply Second Circuit precedent to actions originally filed in New York federal courts and then transferred to the District of Columbia pursuant to 28 U.S.C. § 1407(a). The parties have fully briefed this issue and the Court holds that its July 25, 1985 Memorandum and Order applies to all three categories of actions enumerated by the Court of Appeals.

In *Van Dusen v. Barrack*, the Supreme Court held that in diversity actions, changes of venue within the federal system do not change the *state* law which is applied to the cases. The Court wrote that "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of

courtrooms." *Van Dusen*, 376 U.S. at 639. The Court based its decision on the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938):

> The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to to a substantially different result.

Van Dusen, 376 U.S. at 638 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 100 (1945). The Court applied this policy to transfers pursuant to 28 U.S.C. § 1404(a) to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in a federal court which could not have been achieved in the Courts of the State where the action was filed." *Id.*

Because the principles underlying *Van Dusen* and *Erie* have at their foundation questions of the application of state law, neither is applicable to the situation presented here which involves conflicts between the Circuits concerning federal law. While it is true that several courts (including this Court) have applied the *Van Dusen* rule to claims involving federal law, they have failed to recognize the significance of this distinction.

"The federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than of another determine his case." *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963) (citations omitted). *See also*, *In re The Pittsburgh*, 543 F.2d 1058, 1065 n. 19 (3d Cir. 1976) ("[I]n theory, at least, federal law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact.") What this means in practice is that each federal court is bound to apply federal law the way it believes is appropriate. In the case at hand, this meant that the Court was to thoroughly analyze and consider Second Circuit law (and the law of every other Circuit for that matter) but not to blindly accept it. The conclusion of the

Court's analysis on the issue at hand was that for the reasons stated in its July 25, 1985 Memorandum and Order, the Court did not agree with the holding of *In re Air Crash Disaster of Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) and instead applied what it believed to be an accurate interpretation of federal law. This interpretation applied equally to those actions commenced in federal district courts in New York, Michigan, Massachusetts and the District of Columbia.

Plaintiffs argue in their Memorandum that if transferee courts were to consider cases as described above, the uniformity expressed by *Van Dusen* would be destroyed. While this may be true in the short-run, the long-term benefits of each federal court independently considering an issue are substantial. In this way, an issue may be viewed from several unique perspectives. If at the conclusion of these various analyses more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this matter is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

Plaintiffs also argue that because the case at hand was transferred to the District of Columbia for a limited purpose and shall be returned to the federal courts in New York, this Court should not create a conflict between the law of the case (which would be the law of this Circuit) and stare decisis (which would instruct the District Courts to follow the decisions of their own Court of Appeals). The Court believes, however, that the law of the case clearly controls this situation. Once a court finally decides any issue of law, the law of the case holds that the ruling should be adhered to by a transferor court. If this were not true, and tranferor courts were free to readjudicate issues determined by tranferee courts, tranfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication they were designed to eliminate. This is not to say that the parties to an action must suffer for the sake of more efficient proceedings. As previously

stated, if a litigant believes he or she has been denied a favorable and correct interpretation of federal law, the Supreme Court is available to finally decide the question after an application for certiorari. This should be the course of the present litigation.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: May 7, 1987

Judgment of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

Misc. No. 83-00345

No. 85-5982

IN RE: Korean Air Lines Disaster of September 1, 1983

Plaintiff's Steering Committee,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

RUTH B. GINSBURG, WILLIAMS, and D.H. GINSBURG,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ GEORGE A. FISHER

George A. Fisher
Clerk

Date: September 25, 1987

Opinion for the Court filed by Circuit Judge Ruth B. Ginsburg.

Concurring opinion filed by Circuit Judge D.H. Ginsburg, in which Circuit Judge Williams joins.

Order of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

Misc. No. 83-00345

No. 85-5982

[stamped Nov. 16, 1987]

IN RE: Korean Air Lines Disaster of September 1, 1983.

Plaintiffs' Steering Committee,

Appellant.

Before:

Wald, *Chief Judge*; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, *Circuit Judges*.

ORDER

The petition of Plaintiffs' Steering Committee for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the petition for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, Clerk

BY:/s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

APPENDIX B

A Convention for the Unification of Certain Rules Relating to International Transportation by Air

WARSAW CONVENTION

Relevant Provisions

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I.—PASSENGER TICKET

Article 3

(1) For the transportation of passenger the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily

injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 22

(1) In the transportation of passengers the liability of the carriers for each passenger shall be limited to the sum of 125,000 francs. Where in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900

MONTREAL AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.
>
> Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

> ADVICE TO INTERNATIONAL PASSENGER GN LIMITATION OF LIABILITY
>
> Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other* carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

* Either alternative may be used.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

Federal Aviation Regulation, 14 C.F.R. § 221.175(a)

Special notice of limited liability for death or injury under the Warsaw Convention. (a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

Advice to International Passengers on Limitation of Liability

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as ten point modern type and in ink contrasting with the stock on (1) each ticket; (2) a piece of paper either placed in the ticket

envelope with the ticket or attached to the ticket; or (3) the ticket envelope: *And provided further*, That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

Federal Aviation Regulation 14 C.F.R. § 213.7

Filing requirements for adherence to Montreal Agreement.

It shall be a condition upon the holding of a foreign air carrier permit or other authority authorizing direct foreign scheduled air transportation that the holder have and maintain in effect and on file with the Board a signed counterpart of CAB Agreement 18900 (CAB Form 263), and a tariff (for those carriers otherwise generally required to file tariffs) that includes its provisions, and comply with all other requirements of Part 203 of this chapter. That form can be obtained from the Publications Services Division, Civil Aeronautics Board, Washington, D.C. 20428.